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No. 79

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JOHN D. RANDALL,
Petitioner,

v.

THE COMMITTEE ON PROFESSIONAL ETHICS
AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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March 1980

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

John D. Randall, petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered on November 14, 1979, rehearing denied December 13, 1979.

OPINION AND FINDINGS BELOW

The opinion of the Supreme Court of Iowa, which appears in the appendix hereto, p. 1a, *infra,* is reported at 285 N.W. 2d 161 (Iowa 1979).

The unreported Findings of Fact, Conclusions of Law, and Recommendation of the First Division of the Grievance Commission of the Supreme Court of Iowa, entered February 27, 1979, are in the record below, which has been requested to be certified and lodged with this Court in accordance with Rule 21(1) of the Rules of the Supreme Court of the United States. It is contained at pp. 545-554 of the Appendix to the Appeal from Findings of Fact, Conclusions of Law and Recommendation of the First Division of the Grievance Commission, which is quite lengthy and contains pleadings, edited transcripts of hearings and other exhibits which were before the Supreme Court of Iowa.[1]

JURISDICTION

The judgment of the Supreme Court of Iowa, revoking petitioner's license to practice law in Iowa, was entered on November 14, 1979. Rehearing was denied on December 13, 1979. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

(1) Whether, in revoking petitioner John D. Randall's license to practice law in Iowa, the Supreme Court of Iowa deprived petitioner of liberty and property without due process in violation of the 14th Amendment to the Constitution of the United States,

[1] The Appendix to the Appeal from Findings of Fact, Conclusions of Law and Recommendation of the First Division of the Grievance Commission, which is included in the record requested for certification and transmission to this Court, will be referred to hereafter in this Petition as "Rec. App.". The printed Appendix attached to this Petition will be referred to hereafter as "App.".

by refusing to consider petitioner's constitutional claims on de novo review conducted pursuant to its own rules of procedure.

(2) Whether petitioner has been denied a license to practice law in Iowa in violation of the due process clause of the 14th Amendment by virtue of the failure of the Grievance Commission of the Iowa State Bar to follow its own rules or afford petitioner due process of law.

(3) Whether petitioner's license to practice law in the State of Iowa may be revoked for violation of ethical considerations of the Code of Professional Responsibility for Lawyers of the State of Iowa consistent with the due process clause of the 14th Amendment when the Code, as interpreted by the Supreme Court of Iowa at the time of the offense, not only failed to to provide fair warning that ethical considerations were penal in character, but, on the contrary, indicated that ethical considerations, as distinguished from disciplinary rules, were merely aspirational in character.

(4) Whether certain provisions of the Iowa Code of Professional Responsibility for Lawyers and the Code of Iowa, as applied to petitioner, are so vague and standardless as to deprive petitioner of adequate notice of certain prohibited conduct and subject petitioner to discriminatory enforcement and disbarment in violation of the due process clause of the 14th Amendment.

STATUTES INVOLVED

Fourteenth Amendment, United States Constitution, Section 1:

> "... [N]or shall any State deprive any person of life, liberty or property, without due process of law..."

Code of Professional Responsibility for Lawyers of the State of Iowa, Preamble and Preliminary Statement:

> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances.

Code of Professional Responsibility for Lawyers of the State of Iowa, Ethical Considerations:

EC 1-5. A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-2. A lawyer should not accept proffered employment if his personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3. The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or

withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC 5-5. A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Amended and effective December 16, 1977.

EC 9-6. Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Code of Professional Responsibility for the Lawyers of the State of Iowa, Disciplinary Rules:

DR 1-102. Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

* * * *

(3) Engage in illegal conduct involving a moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 4-101. Preservation of Confidences and Secrets of a Client

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

* * * *

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employ-

ment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-104. Limiting Business Relations with a Client

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Code of Iowa, Section 610.24, Grounds of Revocation:

The following are sufficient causes of revocation or suspension:

* * * *
* * * *

3. A willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed.

4. Doing any other act to which such a consequence is by law attached.

STATEMENT OF THE CASE

This petition questions the constitutional propriety of the revocation of petitioner John D. Randall's license to practice law in the State of Iowa.

The Factual Background

Petitioner met Lovell Myers sometime in the early 1940s. He represented Myers in a 1943 divorce. In

1946, petitioner and Myers began a business association which lasted until Myers' death in 1976.

Petitioner and Myers operated a joint venture in farming. Myers managed the farming operations and petitioner managed the financial affairs, tax work and real estate transactions of the joint venture. In 1967, the joint venture transferred the balance of all farmland to Myers Farms, Inc., a corporation which had been formed in 1952, and in which petitioner and Myers each owned 50% of the stock.

Gilbert Morningstar was employed as a farmworker and foreman of the business from 1946 until 1974. In 1956, he purchased a farm property known as the "Hess 80." There was a dispute as to whether Morningstar operated as a "straw man" for Myers Farms, Inc. in purchasing the property. The property was farmed by the corporation. In 1973, Morningstar discovered the record of a warranty deed to the "Hess 80" from him and his wife to Myers Farms, Inc., plus a subsequent mortgage on the property for $90,000.00.

Morningstar confronted the petitioner and Myers and accused Myers of forging his and his wife's signatures to the warranty deed. Petitioner subsequently joined Myers in quit claiming the property to Morningstar. Morningstar continued to work for Myers Farms, Inc. until 1974, when he resigned and brought suit against Myers and the corporation.

On or about March 14, 1973, and subsequent to the confrontation with Morningstar, Myers executed a will which petitioner had drafted. The will left all of Myers' property to petitioner and named petitioner executor. The petitioner entered an appearance and filed

motions on behalf of Myers in the suit brought by Morningstar in 1974.

The petitioner offered the will for probate after Myers' death in 1976. Myers' only child, Marie Jensen, brought suit to set aside the will. In connection with the will contest, Marie Jensen filed a complaint against petitioner with the Standing Committee on Professional Ethics and Conduct of the Iowa State Bar Association.

The Morningstar suit and the will contest were settled. The complaint filed against petitioner by Myers' daughter resulted in the initiation of disciplinary proceedings which led to the revocation of petitioner's license to practice law.

The Proceedings Before the Grievance Commission of the Supreme Court of Iowa

The Standing Committee on Professional Ethics and Conduct of the Iowa State Bar Association (hereafter "Committee"), by letter dated September 28, 1977, informed the petitioner of its determination to file a complaint with the Grievance Commission arising out of the complaint concerning the Myers will. Rec. App., p. 15. Petitioner was afforded the opportunity to meet informally with the Committee. A complaint was thereafter prepared and sworn to by the Chairman of the Committee. Petitioner, not having been advised of any complaint other than that relating to the Myers will, permitted the Ethics Counsel of the Committee to inspect files and photocopy records.

The Committee filed a two-count complaint against petitioner on May 19, 1978. Rec. App. p. 1. Count I alleged ethical violations involving the Myers will. Count

II alleged conflict of interest by petitioner in representation of Myers and Myers Farms, Inc. in the Morningstar suit. The relevant provisions of the Code of Professional Responsibility for Lawyers of the State of Iowa and the Code of Iowa (which were included in the complaint and which petitioner was found to have violated) are set forth in this Petition at pp. 4-8, *supra.*

Petitioner denied the alleged ethical violations by answer filed June 16, 1978. Rec. App., p. 21. Petitioner further alleged by way of complete defense the failure of the Committee to afford speedy disposition of the matter in violation of due process. Rec. App., p. 23. Petitioner thereafter made applications for discovery pursuant to Rule 118 of the Rules of the Supreme Court of Iowa, which appear in the Appendix hereto, p. 11a. Rule 118.6, Rules of the Supreme Court of Iowa, App., p. 13a.

On July 23, 1978, petitioner filed a Motion for Summary Judgment. Rec. App., p. 9. The motion raised constitutional objections to the Committee's investigation and complaint. Petitioner first raised the question of retroactive application of amended ethical considerations and disciplinary rules relating to the Myers will. Petitioner further alleged that the Ethics Counsel visited petitioner's offices for the purported purpose of investigation of the will matter and that, unknown to the petitioner, the complaint had been drawn and sworn to and the Ethics Counsel was acting as prosecutor as to both the will matter and the alleged conflict of interest. Rec. App., pp. 10-19.

Petitioner also raised constitutional objections to the proceedings before the Grievance Commission by Amendment to Answer to Complaint, filed November 17, 1978. Rec. App., p. 23. Petitioner's fifth defense

therein again raised objections to the actions of Ethics Counsel prior to the filing of the complaint and further alleged violations of procedural due process. Rec. App., p. 25. Petitioner again objected to retroactive application of amended ethical considerations. Rec. App., pp. 25-6. Petitioner also alleged due process violations involving refusal to participate in discovery. Rec. App., p. 27.

During the hearings, the Grievance Commission identified new charges not specified in the complaint against petitioner. Rec. App., pp. 260-275. Petitioner moved that the panel be dissolved. Rec. App., p. 275. The Grievance Commission deferred the question to the Supreme Court of Iowa. Rec. App., p. 278. Petitioner filed a Formal Challenge to the Grievance Commission Panel and Application for Stay Order. The Supreme Court of Iowa, by order dated November 17, 1978, found that " . . . said application should be denied *at this time.*" Rec. App., p. 283 (emphasis supplied).

Hearings ended November 11, 1978, and the matter was submitted to the Grievance Commission, which filed its Findings of Fact, Conclusions of Law and Recommendations on February 27, 1979. Rec. App., p. 545. The Commission found petitioner guilty of violating all ethical provisions cited in the complaint, with the exception of one provision of the Code of Iowa, and recommended disbarment. Rec. App., pp. 245-254.

The Proceedings Before the Supreme Court of Iowa

On March 16, 1979, petitioner filed Exceptions to the Findings of Fact, Conclusions of Law and Recommendation. Rec. App., p. 254. Petitioner excepted to the denial of his challenge to the panel relating to consideration of matters extraneous to the complaint. Rec. App., pp. 254-5. Petitioner further excepted to violation of rules regarding confidentiality involving media coverage of the proceedings. Rec. App., p. 555. Petitioner excepted to violations of his rights to due process under the Constitution of the United States, the Constitution of the State of Iowa, and the Rules of the Supreme Court of Iowa. Rec. App., 555. Petitioner further alleged deprivation of a full and fair hearing on the facts. Rec. App., p. 557. Petitioner excepted to Commission findings of violations of disciplinary rules and ethical considerations on the grounds of vagueness and uncertainty. Rec. App., pp. 550-1, 556. Petitioner's exceptions also included objection to retroactive penal application of ethical considerations. Rec. App., p. 566.

Petitioner filed a Notice of Appeal to the Supreme Court of Iowa on March 16, 1979. Petitioner's brief on appeal is included in the record requested for transmission to this Court pursuant to Rule 21(1) of the Rules of the Supreme Court of the United States. The brief argued violations of petitioner's right to due process involving the complaint, petitioner's right to speedy trial, investigation by the Ethics Counsel, denial of reciprocal discovery, confidentiality, and petitioner's challenge of the panel. Appellant's Brief and Argument, pp. 1-4. On oral submission before the Supreme Court of Iowa, petitioner further argued that the proceedings before the Commission violated his right to due process under the Fourteenth Amendment of the United States Constitution. 285 N.W.2d 161, 164, App. p. 8a.

On November 14, 1979, the Supreme Court of Iowa entered an opinion and order revoking petitioner's

license to practice law. 285 N.W.2d 161, App. p. 1a. The court refused to consider petitioner's due process arguments. 285 N.W.2d 161, 165, App. p. 8a. Although petitioner had raised constitutional objections by pleadings and oral submission before the Grievance Commission, and in Appellant's Brief and Argument and in Oral Submission to the Supreme Court of Iowa, the court deemed the petitioner's due process arguments to have been waived.

Petitioner again raised due process objections in a pro se Petition for Rehearing, which was denied by order of the Supreme Court of Iowa on December 13, 1979.

REASONS FOR GRANTING THE WRIT

1. The Petitioner Has Been Denied Due Process and a Full and Fair Hearing in Violation of the Fourteenth Amendment to the Constitution of the United States.

The practice of law is not a matter of grace or privilege, but of right for those qualified. *Baird* v. *Arizona,* 401 U.S. 1, 8 (1971). Disbarment is a penalty or punishment imposed upon the lawyer in order to protect the public. *In re Ruffalo,* 390 U.S. 544, 550 (1968). Accordingly, petitioner is entitled to procedural due process under the Fourteenth Amendment.

The filing of the complaint against petitioner initiated adversary disbarment proceedings of a quasi-criminal nature. *In re Ruffalo,* 390 U.S. at 551. The Ethics Committee and the Grievance Commission, in undertaking the investigation and proceedings against the petitioner, were bound to provide petitioner procedural due process. In several respects, both the Committee and the Grievance Commission violated petitioner's due process rights under the Fourteenth Amendment. Both the Committee and the Commission were further bound to afford petitioner procedural rights imposed by Rule 118 of the Supreme Court of Iowa, App. p. 11a. Failure to comply with the procedures promulgated by the Supreme Court of Iowa caused petitioner prejudice in violation of due process.

Petitioner was subjected to investigation, and permitted the Ethics Counsel to inspect and photocopy files, without having been fully apprised of the nature of the charges against him. Rec. App. pp. 10-19. The complaint against petitioner had been drawn and sworn to, but not filed. The Ethics Counsel, acting as prosecutor, thereby violated petitioner's right " . . . to procedural due process, which includes fair notice of the charge." *In re Ruffalo,* 390 U.S. at 550. Delay in filing the complaint caused petitioner further prejudice. Rec. App., p. 23.

During the proceedings before the Grievance Commission, petitioner filed an application for discovery. Certain discovery was denied in violation of Rule 118.6 of the Rules of the Supreme Court of Iowa. App. p. 13a.

Petitioner consistently objected to the inclusion in the complaint of violations of ethical considerations relating to the Myers will as the basis for disciplinary proceedings. Petitioner was disbarred for conduct which was not a disciplinary offense when the Myers will was drafted in 1973. At that time, the Iowa Code of Professional Responsibility for Lawyers provided as follows:

> *EC 5-5.* A lawyer should not suggest to his client that a gift be made to himself or for his benefit.

> If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.
>
> *EC 5-6.* A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

The Code has continuously provided that the "Ethical Considerations are aspirational in character. . . . The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." The relevant provisions of the Code were amended on December 16, 1977, during the investigation of petitioner, and were subsequently included in the complaint. This unforseeable judicial enlargement of a penal provision of the Code, which was applied retroactively to petitioner, operates precisely like an ex post facto law, such as Article I, Section 10, of the Constitution forbids. *See Bouie* v. *Columbia,* 378 U.S. 347, 352-3 (1964). In this case, it operated to deprive petitioner of notice that certain conduct would result in disbarment proceedings and therefore violated petitioner's due process rights under the Fourteenth Amendment. *See Committee on Professional Ethics*

and Conduct of the Iowa State Bar Association v. *Behnke,* 276 N.W.2d 838 (Iowa 1979), *cert. denied,* 441 U.S. 95 (1979).

During hearings before the Grievance Commission, new charges not specified in the complaint were identified. Rec. App. pp. 260-275. At that time, a member of the hearing panel stated:

> MR. KEITH: Mr. Chairman and Commission, I'd like to state a personal view as a member of the Commission and that is the pleadings, as such, the way they are framed and in light of the evidence that has come in to date including the exhibits, that at least in my mind there is a possibility that the general matters that you have covered here may be an issue put before this Commission and one that may properly be considered by the Commission without the necessity of amending the complaint as an issue that has been raised and on which evidence has been offered whether it's been done intentionally or inadvertantly, *it is my view that this is a matter that is before the Commission at this time so for at least my personal view is that it is a matter we can consider whether you make any changes in the pleadings or not.* Rec. App., pp. 264-5 (emphasis supplied).

Petitioner thereafter moved for the dissolution of the panel. Rec. App. p. 275. The panel overruled petitioner's challenge. Rec. App., pp. 278-9. The Supreme Court of Iowa deferred judgment on the matter until such time as petitioner should appeal for de novo review. Rec. App., p. 283. By proceeding with the hearings without providing for amendment to the complaint and opportunity for the petitioner to meet and defend the new charges, the Commission failed to follow relevant Iowa law as set forth by the Supreme

Court of Iowa in *Committee on Professional Ethics and Conduct of the Iowa State Bar Association* v. *Crary,* 245 N.W.2d 298, 304 (Iowa 1976). This further resulted in the absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges, thereby depriving petitioner of procedural due process in violation of the Fourteenth Amendment. *In re Ruffalo,* 390 U.S. at 552.

The foregoing violations of petitioner's constitutional right to due process in a disbarment proceeding, individually as well as cumulatively, are substantially prejudicial. This Court recently stated in *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1 (1979):

> It is axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer, supra,* at 481, 33 L.Ed.2d 484, 92 S.Ct. 2593; *Cafeteria & Restaurant Workers Local 473* v. *McElroy,* 367 US 886, 895, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961); *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 162, 163, 95 L.Ed. 817, 71 S.Ct. 624 (1951) (Frankfurter, J., concurring). The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; *the quantum and quality of the process due in a particular situation depends upon the need to serve the purpose of minimizing the risk of error. Mathews* v. *Eldridge,* 424 U.S. 319, 335, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) (emphasis supplied).

The Commission's failure to accord due process and a full and fair hearing raises the spectre of erroneous

findings and subjects the Commission's decisions to sufficient doubt as to dispel the existence of adequate and independent state grounds for petitioner's disbarment. The Committee and Grievance Commission further violated petitioner's due process rights by failing to follow the rules prescribed by the Supreme Court of Iowa in Rule 118, App. p. 11a, and *Crary, supra,* at p. 18, 245 N.W. 2d 298, 304. *See, e.g., Greenholz, supra,* at p. 18, 442 U.S. 1, 60 L.Ed.2d 668, 679-681, 99 S.Ct. ——; *United States* v. *Caceras,* 440 U.S. 741, 59 L.Ed.2d 733, 743, n. 14, 99 S.Ct. ——.

2. The Court Below Has Flagrantly Transgressed Petitioner's Right to Due Process Under the Fourteenth Amendment by Refusing to Consider Petitioner's Constitutional Arguments on De Novo Review Conducted Pursuant to Its Own Rules of Procedure.

Rule 118 of the Rules of the Supreme Court of Iowa provides for appeal and review of Iowa disciplinary proceedings. App. p. 11a. Rule 118.11, Exceptions and Appeal, provides: "Such appeal shall thereafter be reviewed de novo by this Court upon the record made before the Grievance Commission, and shall proceed as provided for appeals of civil cases." App. p. 11a.

Petitioner raised several constitutional objections during the investigation and disciplinary proceedings and on appeal. *Supra,* pp. 10-14. The issues raised by petitioner cast doubt upon the fairness of the hearings and were squarely before the Grievance Commission. *Supra,* pp. 14-18. Regardless of the foregoing, the Supreme Court of Iowa, on de novo review, summarily dismissed the petitioner's due process objections as follows: "We think Randall's due process argument should have been submitted to the Commission and certainly should have been included as a point

in his brief in this submission. Because he failed to do either, *we consider the due process argument waived.*" 285 N.W.2d 161, 165. App. p. 8a (emphasis supplied).

The treatment accorded petitioner on de novo review by the Supreme Court of Iowa is in patent contradiction of the spirit and letter of its own rules. App. p. 16a. The Court's finding of waiver further contradicts the holding of the same court in *Behnke, supra,* pp. 16-17; 276 N.W.2d 838, 841: "We have the ultimate responsibility to determine respondent's fitness to practice law. We would not always discharge that responsibility if we invariably rejected either party's law issues on error preservation grounds."

By refusing to consider petitioner's constitutional objections, the Supreme Court of Iowa compounded the violations of petitioner's due process rights committed by the Committee and the Grievance Commission. *Supra,* pp. 14-18. *See, e.g., In re Ruffalo,* 390 U.S. 544. Furthermore, even if the Supreme Court of Iowa was not required by the Constitution to adopt the procedures set forth in Rule 118, it does not follow that the court had no duty to obey them. *United States* v. *Caceras,* 440 U.S. 741, 59 L.Ed.2d 733, 737, n. 14, 99 S.Ct. ——. The failure of the court below to consider petitioner's constitutional claims on de novo review pursuant to its own rules and holdings violates petitioner's right to due process under the Fourteenth Amendment. *See, e.g., Greenholz, supra,* at p. 18, 440 U.S. 741, 60 L.Ed.2d 668, 679-681, 99 S.Ct. ——; *Caceras, supra,* at p. 19, 440 U.S. 741, 59 L.Ed.2d 733, 743, n. 14; 99 S.Ct. ——.

The Supreme Court of Iowa cannot exclude petitioner from the practice of law in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-9 (1957). For this reason, petitioner's constitutional objections are before this Court. As this Court stated in *Konigsberg* v. *State Bar of California,* 353 U.S. 252 (1957):

> "In view of the grounds relied on in Konigsberg's petition for review, his repeated assertions throughout the hearings of various federal constitutional rights, and the practices of the California Supreme Court, we cannot conclude that the Court, with three of its seven justices dissenting, intended to uphold petitioner's exclusion from the practice of law because his lawyer failed to elaborate in his brief the constitutional claims set forth in his petition for review and in the record of the hearings. Our conclusion is that the constitutional issues are before us and we must consider them." 353 U.S. at 258.

3. The Denial of Petitioner's Constitutional Claims by the Court Below Raises Substantial and Recurring Questions Relating to the Standards of Due Process Applicable to the States in Attorney Disciplinary Proceedings by the Fourteenth Amendment.

The initiation of disciplinary proceedings against a lawyer is a traumatic experience. An accused lawyer may expect that he will not be condemned out of a capricious self-righteousness or denied the essentials of a fair hearing. *Kingsland* v. *Dorsey,* 338 U.S. 318, 320 (1949). This Court has accordingly applied Due Process and Equal Protection to the states in disbarment proceedings. *Schware, supra,* 353 U.S. 232, 238-9. In view of the severity of the penalty of disbarment, an effective standard of due process must apply to the states in order to ensure essential fairness and

minimization of risk of error. This Court has largely left to the states the determination of the limits of due process to be afforded attorneys in disbarment proceedings.[2]

In the absence of specific direction from this Court, the states have failed to refine approaches to reconcile the application of the Fourteenth Amendment to disbarment proceedings. "The problem stems, perhaps, from the conflict resulting from the courts' increasing reassertion of their inherent power over attorneys as officers of the court and the similarly increasing recognition of attorneys as individuals entitled to the same protections as other citizens." "Disbarment in the United States: Who Shall Do the Noisome Work?," 12 Col.J.L.&Soc.Prob. 1, pp. 21-2.

In proceedings before the Grievance Commission, and on appeal to the Supreme Court of Iowa, the petitioner raised several recurring constitutional questions concerning the process due attorneys in disbarment proceedings. *Supra,* pp. 14-18. An example is found in petitioner's arguments concerning due process violations in contravention of *Ruffalo, supra,* pp. 17-18. In the absence of clearly defined limits to the due process mandated by *Ruffalo,* disbarment procedures of the various state courts may fairly be characterized as widely divergent and in a state of disarray:

> Once again, the lower courts responded by disregarding the *Ruffalo* directive. The Supreme Court of Kansas, for example, held that it is not necessary that the accused attorney be notified of specific charges "as long as proper notice is given of the basic factual situation out of which the

[2] *See* "Disbarment in the United States: Who Shall Do the Noisome Work?", 12 Col.J.L.&Soc.Prob. 1 (Fall 1975).

> charges might result." The additional charge which the Supreme Court found violative of Ruffalo's rights was certainly from the same "basic factual situation" as the other charges. Informality and discordance of standards have continued in the various jurisdictions as both state and lower federal courts affirmed their power to conduct proceedings as they saw fit, provided that the elusive due process essentials were not denied. It appears that whatever rule *Ruffalo* was meant to set down has been largely ignored." 12 Col.J.L.& Soc.Prob. *supra,* p. 22, pp. 24-5.

The existence of uncertain due process essentials further exacerbates the problem of conducting disciplinary procedures on the basis of the extremely broad and vague provisions of the Code of Professional Responsibility. The fundamental principles of due process under the Fourteenth Amendment require that potential offenders receive adequate notice of prohibited conduct and that enforcement of laws be uniform and nondiscriminatory.[3] Because the language of the Code is so broad, virtually any foible might be subjectively construed to be a violation or an apparent violation. The result is that in many cases applying the Code, the appraisal of the attorney's conduct ". . . is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question." *In re Ruffalo,* 390 U.S. 544, 556 (White, J., concurring).

The petitioner has been disbarred for conduct deemed violative of vague and standardless Ethical Considerations and Disciplinary Rules which invite

[3] *See, Generally,* Comment, "ABA Code of Professional Responsibility: Void for Vagueness?" 57 N.C.L.Rev. 671 (May 1979).

arbitrary application. The application of certain Code provisions to petitioner's conduct was predicated upon proceedings which contravene due process in several respects. Evasion of petitioner's rights under the Fourteenth Amendment further increased the risk of erroneous deprivation of petitioner's right to practice law. The court below refused to review the petitioner's due process arguments. This Court has noted:

> "Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the Bar should, therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired." *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335, 355 (1872).

CONCLUSION

In the words of petitioner, who was born before the turn of the century and who practiced law some 55 years in his native state of Iowa, "I do not believe I had a fair trial." Petition for Rehearing of Appellant John D. Randall, pro se, p. 3.[4]

The contours of the Fourteenth Amendment become uncertain when applied to state attorney disciplinary

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[4] Petitioner's Petition for Rehearing in the Supreme Court of Iowa is included in the record requested for certification and transmission to this Court pursuant to Rule 21(1) of the Rules of the Supreme Court of the United States.

proceedings. This case raises substantial and recurring federal questions. The due process waiver ruling demands review.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 1980

APPENDIX

APPENDIX 1

SUPREME COURT OF IOWA.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF IOWA STATE BAR ASSOCIATION, *Appellee,*

v.

JOHN D. RANDALL, *Appellant*

No. 63172.

Nov. 14, 1979.

* * * *

HARRIS, Justice.

John D. Randall, the respondent attorney, was charged in a two-count complaint with unprofessional conduct. One count arose from Randall's status as both draftsman and sole beneficiary of a client's will. The other count primarily concerned Randall's representation of the same client in litigation in which there was a conflict between the client's and Randall's interests. Finding violation on both counts, our commission recommended disbarment. On our de novo review we adopt the recommendation.

Randall met Lovell Myers sometime in the early 1940s. In 1943 he represented Myers in his divorce. In 1946 Randall and Myers entered a joint venture for the purchase of farmland in Linn County. The respondent arranged financing for Myers' farming operations. In 1952 the operations were incorporated as Myers Farms, Inc. and Myers and the respondent each received 50 percent of the stock. The corporation did not succeed to all their business activities, however, so the joint venture continued to exist. Myers continued to manage the farms while Randall attended to the financial affairs of the corporation. The attorney-client relationship continued as well. An associate of Randall represented Myers in an audit by the Internal Revenue Service and the Randall office regularly

prepared Myers' and the corporation's income tax returns, attended to real estate instruments, and examined abstracts of title.

Prompted by an audit, the joint venture in 1967 transferred its land to the corporation. The corporation prospered. By the time of Myers' death in 1976 the corporate net worth amounted to about four and one-quarter million dollars.

Marie Jensen, Myers' only child, was born in 1930. After her parents' divorce she lived with her mother but saw Myers frequently. In 1949 she married Warren Jensen. Their two sons were born in 1950 and 1953. The elder was named for Myers. In 1950, Marie and Warren moved on one of the corporation farms but left shortly due to the farmhouse's lack of heat and a disagreement over livestock methods. Nonetheless Myers helped Marie and Warren move to another farm. In 1974 Marie, Warren, and one of their sons moved to Cedar Rapids to assume management of the corporate farms.

Except for these events the relationship between Myers and his daughter is disputed. On the one hand the complainant notes a number of things. There was cooperation between Warren and Myers. Myers acted amicably toward Warren and doted on his grandsons. Myers suffered from diabetes, heart trouble, and cancer and was hospitalized in 1975, after which both Marie and one of her daughters-in-law attended him during convalescence. In 1950 Myers told Marie, without mentioning a will, that when he disposed of his property, she and Sue Jameson (Randall's daughter) would each have a farm plus half interest in Myers Farms, Inc.

On the other hand Randall asserts Myers was hostile toward his daughter. Some evidence offered by Randall must be disregarded as not probative. Yet, James W. Grummer, Myers' business acquaintance, testified Myers

told him in August 1973 that he and Randall had reciprocal wills. (There is nothing in the record to indicate Randall ever executed a will bequeathing anything to Myers.) Randall stated that in 1953 he prepared another will for Myers, also bequeathing the property to himself. It is not shown whether the 1953 will was ever executed.

Richard Nazette, a Cedar Rapids attorney who represented Myers in the Morningstar lawsuit (to be discussed later), testified that Myers was estranged from his daughter during the time she lived with Myers' former wife. This was from 1946 to 1956. Nazette also testified he overheard a 1975 conversation between Myers and Randall about "strained relations" between Myers and Marie.

Randall's secretary also testified Myers remarked, after the 1953 will was prepared, "she" (presumably his daughter) never cared about him. Randall asserted he dissuaded Myers from disinheriting Marie completely in the 1953 will. He also testified Myers and Marie continued in conflict from the time the joint venture was formed until Myers' death. This was the reason, according to Randall, Myers intended to leave all his property to him.

Gilbert Morningstar first worked for Myers in 1938 and resumed as farm worker and foreman from 1946 until the end of 1974. During these years Morningstar and Myers worked together daily and maintained a close personal friendship. Morningstar once loaned $50,000 to Myers Farms, Inc.

In 1956 Morningstar bought land known as the Hess eighty. (Randall testified that Morningstar acted only as "straw man" in this transaction for the Randall-Myers joint venture. But we find no support for such a claim.) Morningstar later bought land known as the Zach-120 acre tract. Morningstar's lands were farmed by Myers Farms, Inc. on a crop-share basis.

During February of 1973 Evelyn Morningstar, Gilbert's wife, visited the Linn County courthouse to learn the legal descriptions of properties she and her husband owned. This was preparatory to making out her will. She discovered a record of a warranay deed to the Hess eighty from her and her husband to Myers Farms, Inc. She also found that the same 80-acre tract was subsequently mortgaged for $90,000. Of course she immediately reported this to her husband.

Morningstar called Randall at his office and told him that Myers wanted to see him there at eight o'clock the following morning. Early the next morning Morningstar told Myers that Randall wanted to see him (Myers) in his office.

Morningstar then confronted the two at Randall's office. He angrily charged that his and his wife's signatures had been forged on the deed. After threatening that someone was going to jail he left. Myers followed him to the hallway outside and admitted to Morningstar that he had forged both signatures. He begged Morningstar to return to the office so that the matter could be discussed. Morningstar refused to do so.

Myers then returned to Randall's office and told him what he had done. Myers was upset and weeping. As a result Randall and Myers, on behalf of the corporation, quit claimed the Hess eighty to the Morningstars. Randall testified that Myers assured him that he would lose nothing by joining in the deed. Randall gave as two reasons for signing: his desire to save Myers from Morningstar's threat of jail and to protect his own associate who had notarized the forged deed in the absence of its signers.

About the time of this incident Marie received a visit from her father. He was very upset and said that Morningstar was no longer to help him farm and that he wanted Marie and Warren to come to Cedar Rapids to help. He

did not tell them why. Later Marie, Warren, and their two sons met with Randall and Myers. Randall did all the talking. He told them that Morningstar was no longer to work on the farms and that Warren and his two sons should come to Cedar Rapids to take over. But a short time after this meeting, Myers wrote that things were to continue as they were and that she and Warren need not come.

Instead, upon Myers' assurance that the mortgage would be satisfied, Morningstar agreed to remain at work for the corporation. The mortgage nevertheless remained a lien for several months. In 1974 Morningstar resigned and brought suit. *See Morningstar v. Myers,* 255 N.W.2d 159 (Iowa 1977).

On March 14, 1973, Myers came to Randall's office and executed a will which Randall had drafted earlier the same day. By the will Myers left all his property to Randall. Randall was named executor. Randall admits that he at no time advised Myers to seek independent counsel in the matter. After it was executed the will was left with Randall. Contrary to the usual procedure in the office no copy of the will was placed in office files; instead the original was placed in Randall's private drawer. Incredibly, Randall testified he then forgot about it.

Shortly after Myers died in February 1976 Marie and Warren visited Randall on corporation business. Randall asked if they knew of any will by Myers and they answered that they did not. Randall denied possession of any such will. Marie learned of her father's will when Morningstar obtained a copy from the clerk of court and delivered it to her.

We do not believe Randall's testimony that he forgot about the matter. We find he was not truthful with Marie when he denied possession of the will.

Marie brought suit to set aside Myers' will. By way of reply Randall filed an action for malicious prosecution and

abuse of process. He also filed a claim in the estate for himself and for the corporation concerning the Hess eighty. After protracted maneuverings the matter was settled. Randall paid Marie $700,000 and conveyed clear title to a corporate farm. Randall also assumed liability as sole devisee for all taxes and costs of administration. The value of this settlement was about one and one-half million dollars.

When Morningstar brought suit Randall entered an appearance and filed motions for Myers. He also initiated an interlocutory appeal to this court. At first Myers refused to be represented by any attorney. Finally at Randall's suggestion Myers retained Richard Nazette who appeared as his attorney in the appeal to us. Randall did, nevertheless, remain attorney for the corporation.

Randall admits that at the time of Morningstar's suit he had some anxieties about whether Myers was treating him fairly. But he stated in these proceedings that these feelings never amounted to a suspicion until 1975 when he read Myers' deposition. He concedes from the time he read the deposition a conflict of interest did arise.

When questioned in a depositon taken in the Morningstar suit about delivering the quit claim deed to the Morningstars Randall testified:

> Q. Did they appear to be upset, the Morningstars? A. Well I don't know. I was pretty upset myself, and I don't know that I particularly paid any attention, because by that time I though that the whole deal had been connived, very frankly. I don't know.
>
> Q. In what respect? A. Well, between Myers and Morningstar. The whole picture was one to me absolutely shocking. I mean—and the fact that there was no opportunity given to discuss and find out what the situation was, I mean, to come in with the very strange way in which it was set up and then to come in with threats. The whole thing looked to me like it was—

> and I didn't know whether it was between Myers and Morningstar because I didn't know just exactly—how close or just what they were trying to do.
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> • • • •
>
> A. Probably was entirely wrong, but I mean, by that time that was sort of seeping through to me. And I didn't pay any attention to whether they were upset or not. I was.
>
> • • • •
>
> A. I had a strange sensation when this thing—this plan or scheme or arrangement on February 17, 1973. I probably had unworthy thoughts, and I still have a strange feeling about the whole picture as far as I'm concerned.
>
> • • • •
>
> Q. But did you, on February 17, 1973, harbor the feeling that Lovell Myers was cheating you in some way? A. Well, very frankly, after Lovell had went and insisted that I join the quit claim deed to keep him out of jail, I thought it was a very strange situation. In fact, I at one time or another told him that I felt it was a very strange situation, because I thought that he was smart enough so that he wouldn't admit a forgery. In other words, it looked too pat to me. It looked as though it was a deal that had been cooked up between the two of them. That was what I concluded afterwards, at the time I was so shocked I didn't have any thinking about it. But then afterwards I thought, of all the pat things to take somebody, this was one of the best.
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> • • • •
>
> A. I thought it was all a setup deal. I mean, including the time when Morningstar had thrown across the table out at his house a round trip ticket to Hawaii that we had paid for and that I had known nothing about. And I said to Lovell, I said, "How many other things that I don't know nothing about?"

Randall's deposition clearly shows he very quickly concluded Myers and Morningstar had deceived him. The preparaton of the will came in the midst of these realizations.

During the grievance commission hearing Randall attempted, without success, to explain by saying that he remained confused and uncomprehending; Myers' explanation had left him unsure that a conpsiracy existed. Even less to his credit Randall took no action when he learned of Myers' forgery. He also came to suspect that Myers had made improper payments from the corporation. Again he took no action because he wanted to secure settlement.

At the hearing before the commission Randall asserted he had not so quickly suspected a conspiracy. Only by 1978, he said, did he realize Myers had left him his estate to repay for the misappropriation of funds.

We flatly reject Randall's attempted explanations and conclude that he represented the corporation in large part to protect his own interests from those of Myers.

I. On oral submission before us Randall suggests that the proceedings before the commission violated his right to due process under the Fourteenth Amendment of the United States Constitution. He did not present this issue before the commission or include it in the brief he submitted to us. In *Committee on Prof. Ethics, etc. v. Behnke,* 276 N.W.2d 838, 840-41 (Iowa 1979), *cert. denied,* —— U.S. ——, 99 S.Ct. 2400, 60 L.Ed.2d 1062 (1979), we discussed what matters can be raised for the first time in submission of a disciplinary proceeding for our review. We think Randall's due process argument should have been submitted to the commission and certainly should have been included as a point in his brief in this submission. Because he failed to do either we consider the due process argument waived.

II. It is complainant's burden of proof to establish the charge by a convincing preponderance of the evidence. This burden amounts to less than is required in a criminal prosecution but is greater than is required in a civil suit. *Committee on Prof. Ethics, etc. v. Bitter,* 279 N.W.2d 521, 522 (Iowa 1979). We find the complainant has easily established both counts in accordance with this standard.

At the time Randall drew the Myers will naming himself as beneficiary EC 5-5 provided in part: "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer, selected by the client." We considered this language in *Behnke,* and held: "A violation of EC 5-5—part and parcel of our ethical code —would be unethical conduct." 276 N.W.2d at 844.

Randall argues that the "exceptional circumstances" language which then existed in EC 5-5, at least in part, is justification for his conduct. We find the argument is patently without merit. Under the unique relationship Myers relied especially heavily on Randall and imposed great faith and trust upon him. An attorney owes no less professional honesty to his business associates and personal friends than to a casual client. There was nothing in the facts in this case amounting to "exceptional circumstances" which would allow Randall to draft the will in his own favor. We have passed from the era in which it can be argued it is professionally acceptable for a lawyer to draw a client's will in his own favor unless undue influence can be shown. We made this clear in *Behnke,* 276 N.W.2d at 844.

III. We have said Randall's representation of both his own and Myers' corporate interests in the Morningstar suit was a conflict of interest. As such it was a violation of DRs 5-101(A) and 5-104(A) interpreting EC 5-1, 5-2, and 5-3. We discussed professional conflicts of interest, in

some detail in *Committee on Prof. Ethics, etc. v. Baker*, 269 N.W.2d 463, 465-66 (Iowa 1978). The conflict, even according to Randall's own testimony, was flagrant and inexcusable. In view of his suspicions about Myers and Morningstar, and his belief the two were involved in a conspiracy against him, it was outrageous misconduct for him to continue in any way to represent Myers' interests.

IV. We must then determine the appropriate action for Randall's misconduct. In doing so we note that we are stung by Randall's testimony in at least two respects. It was a sham to testify that, after drawing a will bequeathing himself upwards of two million dollars and then placing the will in his own desk drawer, he fotgot about it. And Randall's testimony on the crucial question of when he first began to suspect Morningstar and Myers were conspiring against him was contradictory; it shifted to meet complainant's showing of his conflict of interest. Although Randall had a clear right to defend against the charges he did not have a right to do so in a manner that was less than forthright.

There may be some question of whether Randall's convenient memory was more confused than it was corrupt. But the answer to this question does not relate to his fitness to practice law. In either event our conclusion is that his misconduct demands that he be disbarred.

LICENSE REVOKED.

All Justices concur, except McCORMICK, J., who takes no part.

APPENDIX 2

Rules of the Supreme Court of Iowa

GRIEVANCE COMMISSIONERS

Court Rule 118 Complaint Procedure.

Referred to in Rules EC 29, DR 2-101, DR 2-105, Disciplinary Guidelines, Grievance Committee Rules 3 and 7; Ethics Procedure Rule 3.2

118.1 *Grievance commission.* There is hereby created the Grievance Commission of the Supreme Court of Iowa whose members shall be the Committee on Grievances of the Iowa State Bar Association and their successors as confirmed by order of this court. Such members are appointed commissioners of this court. The grievance commission, or a duly appointed division thereof shall hold hearings and receive evidence concerning alleged violations, wherever such violations occur, of the Iowa Code of Professional Responsibility for Lawyers or laws of the United States, and the laws of the state of Iowa or any other state or territory within their respective jurisdictions by lawyers who are members of the bar of this court. The grievance commisson shall have such other powers and duties as are provided in these rules.

THE BAR

118.2 *Processing of complaints.* The members of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association and their successors, as confirmed by order of this court are appointed commissioners of this court to initiate or receive, and process complaints against any attorney licensed to practice law in this state for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or the state of Iowa. Upon completion of any such investigation

the committee on professional ethics and conduct shall either dismiss the complaint made, or admonish or reprimand the complained against attorney, or file and prosecute the complaint before the grievance commission or any division thereof.

118.3 *Reprimand.* In event an attorney is reprimanded by the committee on professional ethics and conduct, a copy of the reprimand shall be filed with the clerk of the grievance commission who shall immediately forward a copy thereof, by restricted certified mail, to the attorney reprimanded, therein stating that he or she has thirty days from the date of receipt thereof to file exceptions thereto with the clerk of the grievance commission. If the attorney fails to file an exception such failure shall constitute a waiver of any further proceedings and a consent that the reprimand be final and public. In that event, the clerk of the grievance commission shall cause a copy of the reprimand to be forwarded to the clerk of this court, together with proof of the aforesaid service thereof and a statement that no exceptions had been filed within the time prescribed. This court shall thereupon cause the reprimand to be spread upon the records of the court as a public document. In event, however, the attorney concerned files timely exception to the reprimand, no report of the reprimand shall be made to the clerk of this court and the reprimand shall be stricken from the records. The committee on professional ethics and conduct may, however, proceed further with any complaint against such attorney before the grievance commission. When a reprimand has been filed but exception is duly taken thereto such reprimand shall not be admissible in evidence in any hearing before the grievance commission.

118.4 *Rules.* The grievance commission and the committee on professional ethics and conduct shall each adopt reasonable rules prescribing the procedure to be followed in all disciplinary proceedings before each such body, which rules shall be subject to approval by this court.

118.5 *Complaints.* Every complaint filed against an attorney with the grievance commission shall be signed and sworn to by the chairman of the committee on professional ethics and conduct and served upon the attorney concerned as provided by the rules of the grievance commission. Such complaints shall be sufficiently clear and specific in their charges to reasonably inform the attorney against whom the complaint is made of the misconduct he or she is alleged to have committed. All complaints, motions, pleadings, records, reports, exhibits, evidence and all other documents or things filed under this rule or received in evidence in a hearing before the grievance commission shall be filed with and preserved by the secretary of the grievance commission in Des Moines, Iowa, all of which shall at all times be available to this court or anyone designated by this court.

Referred to in Grievance Committee Rule 5

118.6 *Discovery.* In any disciplinary proceeding or action taken by the committee on professional ethics and conduct, discovery shall be permitted as provided in R.C.P. 121 to 134 inclusive; 140 and 141; and in 143 to 158. The attorney against whom a complaint has been filed, in addition to the restriction stated in R.C.P. 122(*a*) shall not be required to answer an interrogatory pursuant to R.C.P. 126; a request for admission pursuant to R.C.P. 127; a question upon oral examination pursuant to R.C.P. 140; or a question upon written interrogatories, pursuant to R.C.P. 150; if the answer would be self-incriminatory. In addition thereto, evidence and testimony may be prepetuated as provided in R.C.P. 159 to 166. If either party is to utilize discovery, it must be commenced within thirty days after the date the complaint was filed. The commission may permit amendments to the complaint to conform to the proof or to raise new matters as long as the respondent has notice thereof and a reasonable time to prepare his defense thereto prior to the date set for hearing. The grievance commission, or

any division thereof, shall receive an application and may enter an order to enforce discovery or to perpetuate any evidence.

118.7 *Hearing.* After a complaint has been filed with the grievance commission and an answer filed thereto pursuant to its rules or the time provided for such answer has expired, the grievance commission shall immediately upon the expiration of thirty days from the date the complaint was filed set the matter for hearing and notify all parties thereof at least ten days prior to the date set for such hearing, by restricted certified mail or personal service. If neither party has commenced any discovery within thirty days of the filing of the complaint, the hearing date shall be set not less than forty-five days nor more than sixty days after the filing of the complaint. If a party has commenced discovery, the hearing date shall be set not less than sixty days nor more than seventy-five days from the date the complaint is filed. The commission may grant reasonable continuances but only upon written application supported by affidavit. Proceedings and hearings before the grievance commission or any division thereof shall be confidential unless the attorney involved requests otherwise.

118.8 *Subpoenas.* The clerk of the district court of the county in which any disciplinary hearing is to be held shall issue subpoenas of all kinds upon request of the grievance commission, the complainant, or the attorney against whom a complaint has been filed. Any member of the grievance commission is hereby empowered to administer oaths to all witnesses, and shall cause such testimony to be officially reported by a court reporter. The grievance commission shall report to the supreme court of Iowa the failure or refusal of any person to attend or testify in response to any subpoena or any ruling of said commission.

118.9 *Decision.* At the conclusion of a hearing upon any complaint against an attorney the grievance commission

shall dismiss the complaint, or reprimand the attorney, or recommend to this court that the license to practice law of the accused attorney be suspended or revoked. If the grievance commission reprimands the attorney or recommends suspension or revocation of the attorney's license, it shall report to this court, in writing, its findings of fact, conclusions of law, and recommendations. The commission may permit a reasonable time for the parties to file post hearing briefs and arguments. The disposition or report of the commission shall be made or filed with this court within thirty days of the date set for the filing of the last responsive brief and argument. If the commission cannot reasonably make its determination or file its report within such time limit, it shall report that fact and the reasons therefor to the parties and the clerk of this court. Any determination or report of the commission need only be concurred in by a majority of the con. issioners sitting. Any commissioner has the right to file with this court his or her dissent from the majority determination or report. Such matter shall then stand for final disposition in this court. If the grievance commission dismisses the complaint, no report shall be made to this court, except as provided in rule 118.19. Any report of reprimand or recommendations for license suspension or revocation shall be a public document upon the filing thereof with the clerk of this court.

Referred to in Court Rule 118.11

118.10 *Disposition by the supreme court.* Any report filed by the grievance commission with this court shall be served upon the attorney concerned as provided by the rules of the grievance commission. Such report shall be entitled in the name of the complainant versus the accused attorney as the respondent. If no exceptions are filed or no appeal is taken as hereinafter provided in these rules, the court shall proceed to determine the matter.

This court may revoke or suspend the license of an attorney admitted to practice in Iowa upon any of the following

grounds: conviction of a felony, conviction of a misdemeanor involving moral turpitude, violation of any provision of the Iowa code of Professional Responsibility for Lawyers, or any cause now or hereafter provided by statute or these rules.

118.11 *Exceptions and appeal.* The respondent shall have twenty days to file with the clerk of this court a statement of exceptions to such report filed by the grievance commission pursuant to rule 118.9 and to give notice of appeal therefrom to this court. Such appeal shall thereafter be reviewed de novo by this court upon the record made before the grievance commission, and shall proceed as provided for appeals of civil cases. The complainant, within twenty days after filing of final disposition of a case by the grievance commission may apply to this court for permission to appeal from a ruling, report, or recommendation of the grievance commission. This court may grant such appeal, but not ex parte, and if the appeal is granted, it shall proceed as provided in appeals of civil cases. If such appeal is from the grievance commission's dismissal of a complaint, or of any charge contained therein, such appeal shall remain confidential. In event, however, this court reverses or modifies the report of the grievance commission, such court order of reversal or modification shall become a public record.

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118.20 *Effective dates.* These rules shall have prospective and retrospective application to all alleged violations, complaints, hearings, and dispositions thereof on which a hearing has not actually been commenced before the grievance commission prior to the effective date of these rules.

[Amended by Court Order June 10, 1964; Amended by Court Order October 8, 1970; Amended by Court Order November 8, 1974; 118.10 amended by Court Order January 15, 1975; 118.12, 118.14 and 118.16 amended by Court Order November 21, 1977]

Referred to in Court Rule 121.2—121.5, 123.5

Guidelines Concerning Disciplinary Proceedings Under Supreme Court Rule 118

[See order of June 23, 1975 creating Grievance Commission rules]

There are two methods for disciplinary procedure in Iowa. One is under Iowa supreme court rule 118, and the other is under chapter 610, Code of Iowa, 1977.

The procedure under chapter 610 provides for the filing of a complaint in the district court, and pleadings and trial as with ordinary public litigation, before a three-judge court appointed by the chief justice of the Iowa supreme court. This statement of chapter 610 proceedings is abbreviated because it is not used very much, since rule 118 has become so effective. These guidelines concern themselves with the rule 118 procedure.

Complaints may be filed either with the county or district bar association or directly with the state. There is enclosed herewith a copy of the complaint form used by the state.

Nowhere, either by statute or supreme court rule is there provision defining the authority of a local committee. Traditionally local committees have:

1. Investigated complaints.

2. By personal admonition or in writing warned members of their Bar concerning activities considered improper.

3. Forwarded the material to the state committee for attention. Local committees can, and for many years past have played a very important role in discipline, by meeting with the complainants, hearing "their side" and explaining the whole problem. Often this is all the complainants want and all that is needed. There also is great value in these committees meeting with the lawyer, hearing his

side and, where indicated, influencing him to adjust his fee, correct a minor error, or caution him against certain practices.

If discipline more serious than an admonition is indicated, it is suggested that under existing rules the matter be forwarded to the committee on professional ethics and conduct of the Iowa state bar association. It is entirely possible that that committee will request additional investigation or action from the local committee thereafter.

The members of the committee on professional ethics and conduct are appointed by the president of the Iowa state bar association and confirmed as commissioners of the supreme court. Upon receipt of complaints by that committee, they are investigated to the extent deemed necessary and then acted upon by the committee.

The committee has the authority to:

1. Dismiss the complaint.

2. Admonish (a private communication spelling out the violation that has occurred and cautioning against its repetition).

3. Reprimand. (This is a written reprimand which becomes filed with the clerk of the supreme court and thus becomes a public record unless excepted to by respondent). See rule 118.3.

4. File a formal complaint with the grievance commission.

The members of the grievance commission are appointed by the president of the Iowa state bar association and confirmed as commissioners of the supreme court. The grievance commission receives formal complaints filed by the committee on professional ethics and conduct and may:

1. Dismiss the complaint.

2. Admonish the respondent.

3. Recommend reprimand.

4. Recommend suspension for a certain period of time.

5. Recommend disbarment.

The findings and recommendations of the grievance commission are filed with the clerk of the supreme court. Under rule 118 procedure, this is the first time they become a public record.

The respondent may take exception, and if this is done, the court considers the matter de novo, on the record. Whether or not exception is taken, final action on the recommendation of the grievance commission is by the supreme court, on its order.

There are attached hereto a copy of supreme court rule 118, a copy of the rules of the committee on professional ethics and conduct, and a copy of the rules of the grievance commission.

Local committees are encouraged to confer with the Iowa state bar association committee on professional ethics and conduct whenever in their opinion it seems desirable.

THE IOWA STATE BAR ASSOCIATION COMPLAINT FORM

Re.....(Name of Attorney)
of ....., Iowa

I, ... (Complainant), residing at ...., in the City of ....., State of ....., hereby complain that ....., whose address is ..... has violated the Rules of Ethics and Conduct of the Legal Profession in that:

(Here explain the basis for the complaint)
(Additional pages may be attached if necessary)

IN FILING THIS COMPLAINT, THE UNDERSIGNED HEREBY WAIVES THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN COMPLAINANT AND THE ABOVE NAMED ATTORNEY.

Date .....

.....
Signature of Complainant

Subscribed and sworn to before me this .....
day of ....., 19...

.....
Notary Public in and for the
State of .....

Rules of the Grievance Commission of the Supreme Court of Iowa

[Adopted by Supreme Court order June 23, 1975]

The following shall be the rules of the grievance commission of the supreme court of Iowa:

1. The grievance commission of the supreme court of Iowa is hereafter referred to as the commission, and the members thereof are referred to as the commissioners. The commissioners shall elect from their members one to serve as chairman and one as vice chairman and shall appoint a clerk and assistant clerk who shall serve as secretary and assistant secretary of the commission. In the absence or inability to act, of the chairman, the vice chairman shall perform all duties of the chairman.

2. The commissioners may act as a body or in such divisions as the chairman may direct. Until otherwise directed the commission shall consist of four divisions designated first, second, third and fourth, and each division shall consist of five members. The personnel of each division shall be selected and designated by the chairman for each complaint as required. He shall appoint one of said members to serve as president of said division. One additional member shall be selected as an alternate.

3. All complaints made in accordance with court rule 118 shall be filed with the secretary, who shall refer the same to the committee on professional ethics and conduct, hereafter referred to as the committee.

4. Any complaint filed by the committee shall be filed in the name of the committee as complainant and against the attorney named in said charges as respondent. Thereafter such complaint and charges referred to therein shall be prosecuted by said committee before the commission until final disposition thereof.

5. The secretary shall cause each such complaint to be separately numbered and filed and all subsequent motions, pleadings, orders or other documents relating thereto shall be made part of such file. The secretary shall also provide for a permanent docket to be kept as required by court rule 118.5. All complaints filed by or on behalf of the committee shall be docketed therein and such file and docket shall be kept in substantially the same manner as the records relating to civil action in district court.

6. The secretary shall report the filing of each such complaint to the chairman of the commission, who shall thereupon by written order filed in the cause direct that the same be heard by the commission as a whole or a specified division thereof.

7. Upon the filing of such complaint, the secretary shall also cause a written notice thereof with a copy of said complaint, a copy of court rule 118, and a copy of these rules attached to be served upon the respondent by personal service in the manner of an original notice in civil suits or by restricted certified mail. Said notice shall include a recommendation that the respondent select an attorney to represent him or request the chief justice of the supreme court to appoint counsel on his behalf. Said notice shall also notify said respondent to file a written answer to said complaint within fifteen days after completed service

of said notice. Written return of service shall be made by the person making the service if by personal service, or by the secretary with postal receipts attached if by restricted certified mail, and such return of service shall be filed in the cause. Service shall be deemed complete on the date of personal service or date shown by the postal receipt of delivery of said notice to the respondent. Said notice shall be deemed sufficient if substantially in the form set out in Appendix "A", made a part hereof.

8. The respondent shall file a written answer to such complaint within fifteen days from the completed service of said notice. If he fails or refuses to file such answer within the time specified, the allegations of said complaint shall be considered denied and the commission or a division thereof may proceed as if a formal denial were filed.

9. The chairman of the commission or the president of any division thereof to which a complaint has been referred, shall direct a hearing to be held upon such complaint within a reasonable time, in the county of respondent's residence or at the discretion of the chairman within any other judicial district as shall most nearly serve the convenience of the parties, and shall designate by written order the time and place for such hearing and the personnel of the commission or division. The secretary shall mail a copy of said order to all parties and attorneys at least ten days before the date set for said hearing. If the respondent files written objections to the hearing of said complaint in the county of his residence, the hearing shall be held at such other place as the chairman or division president shall direct by written order in which case a new notice shall be given as above prescribed.

10. No hearing shall be continued except for good cause. Except in case of emergency, any motion for continuance shall be filed at least seven days before the day of hearing. Any objections to continuance shall be filed promptly thereafter.

11. The chairman of the commission or president or any member of a division to which a complaint has been referred, or any attorney against whom a complaint has been filed, may request the clerk of the district court of the county in which any disciplinary hearing is held to issue subpoenas of every kind in all matters pending before the commission or division thereof and the clerk shall issue same. Any member of the grievance commission is hereby empowered to administer oaths to all witnesses and shall cause such testimony to be officially reported by a court reporter.

12. All answers, motions, applications, petitions, and pleadings in connection with a complaint shall be filed in duplicate with the secretary at his office in Des Moines, Iowa, and the secretary shall prepare and mail copies thereof to the respondent, the chairman of the committee, attorneys of record, and to the chairman of the commission if sitting as a whole, or to the president of a division thereof to whom such complaint has been referred; provided, however, that on and after the day fixed for hearing any such papers may be filed in duplicate with the chairman of the commission or the president of the division, as the case may be, who shall notify all parties and attorneys of the filing thereof and a copy shall be filed with the secretary.

13. If prompt written request is filed by or on behalf of any party for a hearing upon any preliminary motion or application filed in connection with a complaint, the chairman of the commission sitting as a whole or the president of the division to whom such complaint has been referred shall by written order fix a time and place of hearing upon such motion or application and shall notify all parties and attorneys. After such hearing or if none is requested, such chairman or president of a division as the case may be, or any member of the commission or division designated by such chairman or president, shall file his written ruling upon such motion or application and thereafter all parties

shall promptly comply with the terms and conditions thereof.

14. The respondent may challenge the impartiality of any member of the commission or division by motion setting forth the grounds therefor and filed within the time allowed for filing answer to the complaint. Said motion shall be disposed of as provided in rule 13 and if the challenge is sustained the vacancy thus created shall be filled as provided in rule 17.

15. At the time and place fixed for the hearing upon any complaint, the commission or division thereof shall proceed to hear the evidence, briefs of authorities and arguments in connection therewith. The hearing shall be private unless a written request for a public hearing is filed by the respondent. All witnesses shall be sworn by a person authorized by law to administer oaths or any member of the grievance commission and their testimony shall be taken in writing by a duly qualified reporter. The rules governing procedures and the order and admissibility of evidence in causes tried in district court without a jury shall be adhered to as nearly as practicable. All questions of procedure, including objections to evidence, shall be determined by the chairman of the commission or president of the division, as the case may be.

16. At the conclusion of a hearing upon any complaint against an attorney before such commissioners, the commissioners are empowered to dismiss such complaint or to reprimand the accused, and in the event of such reprimand, the commissioners shall promptly file their report of such action with the clerk of the supreme court, or if action by the supreme court of suspension or revocation of the license of such attorney to practice in the courts of this state is recommended, the commissioners shall make a report to the supreme court of their recommendations and conclusions of fact and law concerning the complaint, answer and proof within a reasonable time of the date of the

last responsive brief and argument and thereupon such matters shall stand for hearing and disposition in the supreme court. Any member of the commission has the right to file with the supreme court his or her dissent from the majority determination or report.

The secretary shall cause a copy of any such report to be served on the respondent in the manner prescribed by rule 353 of the Iowa rules of civil procedure except that such service and proof thereof may be made by the secretary or by an attorney in the case or his clerk. Such report and recommendation of the commissioners shall be filed with the supreme court, together with proof of service of a copy thereof upon the respondent, and entered on the docket, entitled in the name of the respondent in the matter, as provided by rule 353* of the Iowa rules of civil procedure, and the respondent therein shall have twenty days from the date of such filing to file exceptions thereto, and shall, within sixty days after the filing of such exceptions, file with the supreme court the pleadings, the transcript and exhibits. The secretary, upon request of the respondent and payment of the actual cost thereof, shall certify to the supreme court the pleadings, transcript and exhibits. Within thirty days after the filing of such certified pleadings, transcript and exhibits, the respondent shall file his printed brief.

If the charges are dismissed by the commissioners, no publicity shall be given to any of the proceedings except at the request of the respondent. All reports and recommendations of the commissioners shall be concurred in by at least three members of the division or at least twelve members of the commission as the case may be, all of whom shall have been present throughout the proceedings.

*Revoked by Court Order, June 1, 1977

17. In case of the absence or inability of the chairman and vice chairman of the commission sitting as a whole to

perform any of the duties provided for herein, said commission may designate some other member to perform such duties as acting chairman. In case of the absence or inability of the president of a division to perform any of the duties provided for herein, said division may designate some other member thereof as acting president to perform such duties. If a vacancy occur in any division from any cause, the same shall be filled by the chairman, vice chairman or acting chairman of the commission.

18. No omission, irregularity or other defect in procedure shall render void or ineffective any act of the commission or a division or any member thereof unless substantial prejudice is shown to have resulted therefrom.

* * * *

Rules of Procedure

PROFESSIONAL ETHICS AND CONDUCT COMMITTEE OF THE IOWA STATE BAR ASSOCIATION

[Adopted by Supreme Court order December 12, 1974]

1.1 *Complaints.* Complaint forms shall be available to the public from the secretary of the Iowa state bar association or the chairman of the committee.

1.2 *Filing.* Complaints shall be accepted from any person, firm or other entity believing that an Iowa lawyer has been guilty of a disciplinary infraction.

a. Complaint must be sworn to, except when filed by a judge of a court of record.

b. Complaints shall include whatever exhibits complainant desires to submit.

c. They shall be filed, without charge, with the secretary of the Iowa state bar association.

d. The committee may, upon its own motion, initiate any investigation or disciplinary action.

2.1 *Secretary's procedure.* Upon receiving a complaint in proper form as provided in section 1 hereof, the secretary of the Iowa state bar association shall:

a. Make a card record indicating the date filed, name and address of complainant, name and address of respondent lawyer, with a brief statement of the charges made. This card ultimately also shall show the final disposition of the matter when it is completed.

b. Forward the original and a duplicate for each lawyer charged in such complaint to the chairman of the committee.

c. The secretary shall keep all files in permanent form and confidential, unless otherwise provided or directed in writing by the chairman of the committee for disciplinary purposes or by a specific rule of the supreme court of Iowa; provided, however, that all such files shall be available for examination and for reproduction therefrom, by the designated officer or agent of the client security and attorney disciplinary commission, pursuant to proceedings under supreme court rule 121.

d. Any such files shall be open to the inspection of the lawyer complained against.

3.1 *Committee procedure.* Upon receipt of any complaint the chairman of the committee shall notify the complainant in writing that the complaint has been received and will be acted upon.

3.2 The chairman shall forward to the respondent by restricted, certified mail, marked "Confidential", a copy of the complaint, requesting a written response thereto, and copies of the committee rules and of supreme court rule 118.

3.3 If after thirty days, no such response from respondent has been received, he shall be notified by restricted certified mail that unless he responds thereto within ten

days from receipt of notice, complaint may be filed with the grievance commission for failure so to respond, and concerning all or any portion of the matter about which complaint was made, and the committee shall proceed therewith thereafter, if no response is received.

3.4 Upon receipt of response the committee shall:

a. Dismiss the complaint, and so notify complainant and respondent in writing, or

b. Cause the case to be docketed for consideration of the committee at its next hearing-meeting, or

c. Arrange for investigation of the complaint either by a member of the young lawyers section of the Iowa state bar association, the committee counsel or another person, whichever in the judgment of the chairman is appropriate.

3.5 When the report and recommendation of investigator is returned to the committee, which shall be within a reasonable time, the committee shall:

a. Dismiss the complaint, and so notify complainant and respondent, or

b. Cause the case to be docketed for consideration of the committee at its next hearing-meeting.

3.6 If either witnesses or the respondent or complainant or any of them is required to give testimony before the committee, such person or persons shall be given at least seven days written notice in advance of the hearing-meeting at which they are requested to attend and testify.

4.1 *Hearing-meeting.* Hearing-meetings shall be held quarterly, as nearly as possible. A majority of the committee shall constitute a quorum. The chairman or his designate shall see to the preparation of a record of such meetings which shall become a part of the permanent files of the Iowa state bar association. Any evidence taken shall be under oath and may be made of record. Upon completion

of the consideration of any matter before the committee, the members, by majority vote of those present shall:

4.2 Continue the matter if necessary for appropriate reasons or purposes, or

4.3 Dismiss the complaint, or

4.4 Admonish the lawyer or lawyers concerned, or

4.5 Reprimand the lawyer or lawyers involved, or

4.6 File complaint before the grievance commission of the supreme court of Iowa, as complainant, and, thereafter shall:

4.7 In cases of dismissal, so notify complainant and respondent.

4.8 In cases of admonition, notify complainant that "appropriate action has been taken".

4.9 In cases where complaint is filed before the grievance commission, prosecute said complaint to final determination.

5.1 Any member of the bar desiring to expand the information authorized for disclosure pursuant to the provisions of DR 2-101 or DR 2-105, Iowa Code of Professional Responsibility for Lawyers, or to provide for its dissemination through forums other than therein authorized or otherwise to change those rules, may apply to the committee. Such application shall be made in writing by restricted, certified mail, and shall include such documentation as the applicant deems appropriate. The committee thereafter shall determine, on the basis of documentation at hand, further investigation, or whatever hearings it deems to be necessary, whether all or any part of the proposal is necessary in the light of existing provisions of the code, accords with the standards of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services.

5.2 If the committee is of the opinion that no relief should be granted in response to any such application and no changes are necessary, it shall make a determination to that effect and then shall proceed as provided hereinafter.

5.3 If the committee concludes that relief should be granted in response to such application, it shall make its determination to that effect and submit the same to the supreme court by filing the same with the clerk of the court as a recommended amendment to the Iowa Code of Professional Responsibility for Lawyers, universally applicable to all lawyers admitted to practice in Iowa.

5.4 Within ten days after the committee has made its determination under paragraphs 5.1 and 5.2 herein above, it shall notify applicant of its determination by furnishing said applicant a copy thereof by restricted, certified mail. Applicant shall have thirty days from the date of the said mailing by the committee to the applicant to take exception to all or any part of the determination of the committee. Said exceptions shall be taken by filing with the committee within said thirty-day period, complete written notice and documentation of the exceptions and the reasons therefor, which shall be forwarded to the committee by restricted, certified mail.

5.5 Within thirty days from the receipt of the exceptions, the committee shall file with the clerk of the court a copy of said exceptions and documentations attached thereto, together with any written response which the committee seeks to make to the court together with a certification of its mailing to the applicant a copy of its response to the exceptions, in order that the court may determine the whole matter, with or without hearing, as to the court may appear appropriate and desirable.

5.6 Nothing herein contained shall permit any publication other than provided in DR 2-101 or DR 2-105 unless and until said DR 2-101 or DR 2-105 shall be amended by

the court. No applicant for expanded information for disclosure or other publication under the said rules shall make such disclosure or publication until the same specifically has been approved by rule of the court.

[Adopted by Supreme Court Order May 18, 1978]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1416

JOHN D. RANDALL,
Petitioner

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1416

JOHN D. RANDALL,
Petitioner

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Iowa is reported as *The Committee on Professional Ethics and Conduct of the Iowa State Bar Association* v. *Randall*, 285 N.W.2d 161 (Iowa 1979).

JURISDICTION

The final order of the Iowa Supreme Court disbarring the Petitioner from the practice of law in Iowa was entered November 14, 1979. Rehearing was denied on December 13,

1979. Petitioner, in the jurisdictional statement of his petition for writ of certiorari, sets forth no grounds on which the jurisdiction of this Court is predicated and asserts only that jurisdiction is conferred in some unspecified manner by Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner was disbarred for having violated *Iowa Code of Professional Responsibility for Lawyers*, Disciplinary Rules 5-101(A) and 5-104(A), and Ethical Consideration 5-5, as follows:

Iowa Code of Professional Responsibility for Lawyers (1973):

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

Petitioner asserts that the case involves due process of law as provided in Amendment 14, United States Constitution, as follows:

> ***[N]or shall any State deprive any person of life, liberty, or property, without due process of law;***

QUESTIONS PRESENTED

(1) Were the proceedings before the Grievance Commission and the Iowa Supreme Court conducted in accordance with the principles of due process and, in any event, did Petitioner waive his due process argument by presenting the Iowa Supreme Court only the issue "Should John Randall be Disbarred or Suspended?"

(2) Was the conduct of the Petitioner such that any reasonable lawyer would know it was wrong and subject him to discipline and is the language of the ethical considerations and disciplinary rules under which Petitioner was charged sufficiently clear so as to give adequate notice of conduct that will be subject to disciplinary action?

STATEMENT OF THE CASE

John D. Randall, the Petitioner, was an attorney, business associate, and friend of Lovell Myers. These various relationships had their inception sometime in the early 1940's and continued until Myers' death in 1976.

On February 17, 1973, an individual known as Gilbert Morningstar accused Lovell Myers and Petitioner of forging a deed for approximately eighty acres of land from Gilbert Morningstar and his wife to a corporation, Myers Farms, Inc., wholly owned by Petitioner and Lovell Myers. On the same day, Lovell Myers admitted the forging and the Petitioner and Lovell Myers, on behalf of the corporation, quit claimed this eighty acres of land back to Gilbert Morningstar. During discovery depositions in the will contest filed by Lovell Myers' daughter and a civil suit commenced by Gilbert Morningstar against Myers Farms, Inc., the Petitioner alleged that this eighty acres was the property of Myers Farms, Inc., and, further, that Lovell Myers and Gilbert Morningstar had, over the years, by a common scheme misappropriated corporate assets. Despite the conflict which arose between Petitioner's interests and those interests of Lovell Myers when Petitioner believed that Myers and Gilbert Morningstar had conspired against him to defeat his ownership of the eighty acres, Petitioner continued to act as attorney for both Myers and the corporation.

Twenty-five days after the accusation by Gilbert Morningstar, on March 14, 1973, the Petitioner drafted a Last Will and Testament for Lovell Myers, which was shortly thereafter executed by Myers, leaving all of Myers' property (which had a gross value of approximately two million dollars) to Petitioner. Lovell Myers' daughter, Marie Jensen, and her family with whom Myers had maintained a clsoe family relationship over the years, were not mentioned in the will. Upon the offering by Petitioner of the will for probate, Lovell Myers' daughter brought suit to set aside the will. This will contest was settled for approximately one and one-half million dollars.

The Petitioner's conduct was originally brought to the attention of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association by a letter from Lovell Myers' daughter, Marie Jensen. The Committee then obtained copies of the discovery depositions, including the deposition of Petitioner, taken in the will contest case Marie Jensen had filed. The Petitioner's testimony was such that the Committee then initiated, upon its own volition pursuant to Court Rule 118.2, a further inquiry into Petitioner's conduct as it involved Lovell Myers.

The Lawyer Disciplinary Procedure of the Iowa Supreme Court is separate and distinct from the Iowa State Bar Association. Pursuant to the Iowa Supreme Court Rule 118, the Committee on Professional Ethics and Conduct first acts (in substance) as a grand jury to determine if charges should be brought. The Ethics Committee is not an adjudicatory tribunal and matters before it are not adversary. Meetings of the Ethics Committee are held to consider the investigation of complaints against lawyers and may or may not involve a personal appearance by the lawyer concerned.

If, after investigation, the Committee on Professional Ethics and Conduct brings charges against an attorney, the Committee prosecutes the matter before a division of the Grievance Commission of the Iowa Supreme Court. The Grievance Commission is a "separate court" established by the Iowa Supreme Court to hear lawyer disciplinary cases. The Grievance Commission is an entity completely separate from the Ethics Committee. A division of the Grievance Commission consists of five lawyers who hear the evidence presented in a trial setting and thereafter make findings of fact, conclusions of law, and recommend appropriate action to the Supreme Court of Iowa. Any recommendation for disciplinary action then stands for final disposition in the Supreme Court. Only the Supreme Court may take action against a lawyer. If the lawyer files exceptions to the findings of facts and recommendations of the Grievance Com-

mission, the Supreme Court reviews the record made before the Commission de novo (as provided in Court Rule 118.11) and makes its own findings of fact upon which it takes appropriate action.

The Petitioner, John Randall, was found guilty by the Iowa Supreme Court of a flagrant and inexcusable conflict in violation of DRs 5-101(A) and 5-104(A), as well as EC 5-5. The Petitioner had been notified, in writing, that a complaint was to be filed against him by the Committee on Professional Ethics and Conduct. He was given the opportunity, which he accepted, to discuss the matter further with a subcommittee of the Ethics Committee in Des Moines. At the meeting, the Petitioner stated that an adequate investigation had not been undertaken and that he had material evidence in his possession that would dispose of any allegations of misconduct against him. He requested that the Committee send someone to Cedar Rapids to view the evidence. Lee Gaudineer, known to Petitioner as counsel and prosecutor for the Ethics Committee, went to Cedar Rapids, viewed Petitioner's files, and listened to explanations made by Petitioner and his associate. Mr. Gaudineer also interviewed other Cedar Rapids area attorneys as requested by Petitioner.

This further investigation at Petitioner's request provided the Committee with no new information. The investigation requested by Petitioner resulted only in a delay in the filing of the complaint.

Once the Committee on Professional Ethics and Conduct files a complaint against a lawyer, that lawyer is always provided with an impartial hearing with all the requirements of due process. As provided in Court Rule 118, this hearing is before the Grievance Commission of the Iowa Supreme Court. Petitioner was provided a hearing before the first division of the Grievance Commission.

Petitioner received a very fair trial. None of his constitutional rights were violated. The Petitioner attempted to delay the proceedings by filing many interrogatories and requesting to take depositions of the members of the Ethics Committee and their counsel. The Committee resisted these requests. Many of Petitioner's requests for discovery were granted. Discovery that was not permitted consisted of depositions Petitioner sought to take of the members of the Committee and their counsel. The Grievance Commission, by the president of the first division, held the discovery depositions improper. The Iowa Supreme Court granted Petitioner's request to appeal this ruling to the court before final judgment. The Court, upon hearing this appeal, sustained each of the rulings of the president of the first division of the Grievance Commission. The Petitioner did not include this ruling as any alleged error in his final appeal.

The Supreme Court of Iowa considered another interim application of Petitioner's. It is customary for individual members of the Grievance Commission division to ask questions of witnesses if they desire. Upon members doing this, Petitioner challenged the division. The division immediately recessed to permit him to carry the challenge to the Iowa Supreme Court. The challenge was denied at that time but leave was granted to renew it any any subsequent time. Petitioner did not renew the challenge or allege this as error in his appeal.

The Grievance Commission filed findings of fact, conclusions of law and recommendations for disciplinary action by the Iowa Supreme Court. On March 16, 1979, Petitioner filed a notice of appeal to the Supreme Court of Iowa. In his brief on appeal, Petitioner raised only one issue: "Should John Randall be Disbarred or Suspended?"

On November 14, 1979, the Supreme Court of Iowa entered an opinion and order revoking Petitioner's license to practice law in the state of Iowa, finding Petitioner to have violated DRs 5-101(A) and 5-104(A), and EC 5-5. Rehearing was denied on December 13, 1979.

ARGUMENT

I

The Proceedings Before the Grievance Commission and the Iowa Supreme Court Were Conducted in Accordance With the Principles of Due Process and, in Any Event, Petitioner Waived His Due Process Argument by Presenting the Iowa Supreme Court Only the Issue "Should John Randall Be Disbarred or Suspended?"

Procedural due process requires the protections of at least notice and the opportunity to be heard, and potentially requires a neutral decision maker, the opportunity to present evidence or witnesses, the opportunity to confront the witness against the individual, and the right to counsel. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). As the facts in the Statement of the Case detailing Petitioner's disciplinary proceeding show, all of these requirements of due process were met during that proceeding.

Petitioner had notice of the disciplinary action which was to commence with regard to his conduct in drawing the Myers will and in his continuing to represent Lovell Myers despite the conflict of interest present. This was all detailed in the Complaint against the Respondent filed by the Ethics Committee with the Grievance Commission. Petitioner had a hearing before an impartial decision maker, the Grievance Commission of the Iowa Supreme Court. Petitioner had the opportunity to present evidence and witnesses, as well as to cross examine witnesses of the Ethics Committee. Petitioner was represented by counsel. Frankly, the proceeding met the requirements of procedural due process of a regular Court trial and easily those set forth in *Goldberg, supra.*

Petitioner was informed a complaint was to be filed against him by the Committee on Professional Ethics and Conduct. He asserts he was then "subjected to investigation." In fact, Petitioner requested this investigation.

Petitioner asserts that he was denied discovery in violation of Court Rule 118.6. As the facts set forth in the Statement of the Case show, Petitioner was granted the discovery he requested which was proper under Court Rule 118.6. The discovery denied was considered improper under Court Rule 118.6 by the president of the Grievance Commission division and the Supreme Court of Iowa affirmed that decision in a interim ruling.

Petitioner asserts prejudice and a violation of due process because the Ethics Committee failed to afford a speedy disposition of the matter. Any delay in filing the complaint was caused by Petitioner. Petitioner requested the right to appear before a subcommittee of the Ethics Committee. He then requested additional time-consuming investigation. After that investigation was completed, the Committee again considered the matter and again informed Petitioner a complaint would be filed. The complaint was then filed.

Petitioner asserts that he did not have fair notice of the charges brought against him. The complaint filed by the Ethics Committee clearly set forth the charges brought against Petitioner and the conduct upon which those charges were based. It was not amended before or during trial. The complaint charged Petitioner with numerous violations of the *Iowa Code of Professional Responsibility* by his conduct in naming himself sole beneficiary of Lovell Myers, and by his continued representation of Lovell Myers despite the conflict of interest that was present. The conduct set forth in the complaint was the conduct for which Petitioner was disbarred by the Iowa Supreme Court. Petitioner had notice of this complaint and more than adequate time to defend against the charges contained therein. Petitioner's assertion of no fair notice is without merit as is his assertion that new charges were identified before the Grievance Commission.

The Grievance Commission provided Petitioner a full and fair hearing in accordance with due process. See Statement of the Case. Any allegations otherwise are totally unfounded. The

Petitioner did not challenge the conduct of his trial before the Iowa Supreme Court.

On appeal to the Supreme Court of Iowa, Petitioner's brief raised one issue: "Should John Randall be Disbarred or Suspended?" Contrary to Petitioner's assertion, the brief raised no due process issue and contained no argument of due process violations. The Supreme Court of Iowa ruled that Petitioner waived consideration of his due process argument, if one he had, by failing to properly present it to the Court. *Committee on Professional Ethics and Conduct of the Iowa State Bar Association* v. *Randall*, 285 N.W.2d 161, 165 (1979).

Petitioner has relied on 28 U.S.C. §1257(3) to confer jurisdiction on this Court. That statute requires that the Petitioner must not only "specially set up" or claim a constitutional right, title, privilege or immunity, but he must do so "at the proper time and in the proper manner." *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181 (1919); *Mutual Life Insurance Co.* v. *McGrew*, 188 U.S. 291, 308 (1903). This principle is not discretionary; it is jurisdictional. *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968) (Harlan, J. dissenting). For the Petitioner's allegations to be effectively maintained, they must have been properly presented to or passed upon by the state court. The Supreme Court has consistently refused to decide issues presented to it for the first time. *Tacon* v. *Arizona*, 410 U.S. 351 (1973) (As the constitutional questions presented in the petition for certiorari were not raised below nor passed upon by the State's highest court, the writ of certiorari was dismissed as improvidently granted where the only issue actually litigated did not alone justify exercise of certiorari jurisdiction); *Nelson* v. *County of Los Angeles*, 362 U.S. 1, 9 (1960); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

Petitioner was afforded all the safeguards of procedural due process and, in any event, he failed to properly present any constitutional issues to the Supreme Court of Iowa. He cannot now present them to the United States Supreme Court.

Respondent submits that this Court is without jurisdiction to review the determination of the Supreme Court of Iowa as no constitutional question was properly presented to or passed upon by that Court. *See, Wolfe* v. *North Carolina*, 364 U.S. 177, 194-196 (1960); *Bailey* v. *Anderson*, 326 U.S. 203, 206-07 (1945). This case clearly falls within a class of cases aptly described by this Court in *Chicago, Indianapolis & Louisville Railway Co.* v. *McGuire*, 196 U.S. 128, 133 (1905);

> "This case is the not infrequent one of an attempt to clutch at the jurisdiction of this Court as an afterthought, when all other resources of litigation have been exhausted."

It is apparent, therefore, that the lack of any constitutional question negates any inference of jurisdiction under 28 U.S.C. §1257(3) and that the Petition must be denied.

II

The Conduct of the Petitioner Was Such That Any Reasonable Lawyer Would Know It Was Wrong and Subject Him to Discipline; In Any Event, the Language of the Ethical Considerations and Disciplinary Rules Under Which Petitioner Was Charged is Sufficiently Clear So As to Give Adequate Notice of Conduct That Will be Subject to Disciplinary Action.

Petitioner asserts that he has been denied due process in his disciplinary proceeding because the language of the Ethical Considerations and Disciplinary Rules of the *Iowa Code of Professional Responsibility for Lawyers* is vague and standardless and therefore unconstitutional. His argument in his regard is confined to EC 5-5. However, his violation of DRs 5-101(A) and 5-104(A), alone, are sufficient to sustain the judgment of the Iowa Supreme Court. They are not vague. Petitioner, in his application, would ask this Court to ignore this very obvious fact.

In making such assertion, the Petitioner has assumed a very heavy burden of proof in overcoming the presumption of constitutionality and negating every conceivable interpretation favoring constitutionality. *Fleming* v. *Nestor*, 363 U.S. 603, 617 (1960); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); *Moorman Mfg. Co.* v. *Bair*, 254 N.W.2d 737 (Iowa 1977), aff'd 98 S. Ct. 478 (1978).

The Petitioner has not cited any authorities holding that any part of the *Code of Professional Responsibility for Lawyers* has ever been found to be unconstitutional for being vague and indefinite. To the Respondent's knowledge, few cases have ever really addressed the constitutionality of the Canons or the Code of Professional Ethics.

In *Complaint of Rook*, 556 P.2d 1351, 276 Or. 695 (1976), an allegation of vagueness was made against DR 1-102(1) (a lawyer should not violate a disciplinary rule) and DR 1-102(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice). A district attorney had been accused of refusing to plea bargain with criminal defendants on the same basis as previously offered to other criminal defendants as long as such persons were represented by either of their attorneys. The court disposed of this issue as follows: (at 1357)

> "As for the contention by the accused that the terms of DR 1-102(1) and (5) are unconstitutionally vague, we believe that as standards of professional conduct they are sufficiently definite for the purpose of a professional disciplinary proceeding. See *Board of Medical Examiners* v. *Mintz*, 233 Or. 441, 448, 378 P.2d 945 (1963). We have previously held that such a proceeding is not a criminal proceeding and that the technicalities of criminal law, which are properly invoked to safeguard the liberty of citizens, are not necessarily relevant in the investigation of unethical conduct by an attorney. See *In Re Gronnert*, 242 Or. 233, 236, 391 P.2d 772 (1965). See also, *In Re Laske*, 269 Or. 146, 158, 523 P.2d 1262 (1974). This is particularly

> true where, as in this case, no First Amendment freedoms have been violated. Cf. *State* v. *Nelson*, 210 Kan. 637, 504 P.2d 211 (1972)."

In the case of *State* v. *Nelson*, 211 Kan. 637, 504 P.2d 211 (1972), an attorney was charged with violating DR 1-102(A)(5) in connection with certain statements he made to the newspapers covering a law suit in which his client lost. The statements were critical of the courts in general. The attorney asserted that the word "prejudicial" as it appears in DR 1-102(A)(5) was unconstitutionally vague. The Court stated as follows:

> "... Respondent's position is unsupported in both instances. The word 'prejudicial' is universally found throughout the legal and judicial system. Specific definitions are found in any dictionary." 504 P.2d at 214.

The attorney also argued that the Section created impermisible and chilling effects on his First Amendment rights. The Court stated:

> "... [An examination of decisions on the point (12 A.L.R.3d, *Annotation*, p. 1408)] reveals the concensus to be an attorney's right to free speech is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held. In the case of *In Re Sawyer*, 360 U.S. 322, 79 S. Ct. 1376, 3 L.Ed.2d 1473, the last case in which the United States Supreme Court addressed itself to the subject, it appears that at least five Justices agreed that the right to free speech may not be invoked to protect an attorney against discipline for unethical conduct." 504 P.2d at 214.

The Petitioner has cited the case of *In Re Ruffalo*, 390 U.S. 544 (1968) for the authority that an attorney in an attorney disciplinary hearing must be afforded the rights of due process and that such proceedings are quasi-criminal. In that case, the charges for which the attorney was disbarred were not filed until

the third day of hearings, after the attorney had testified. Petitioner herein cannot in good faith assert that he did not have notice of the charges for which he was disbarred. All charges brought against Petitioner were contained in the Complaint and filed prior to the hearing of the Grievance Commission. Petitioner was given adequate time to prepare for the hearing, with knowledge of those charges.

This Court in the *Ruffalo* case made certain statements appropos to the case at bar wherein it stated:

> "A relevant inquiry in appraising the decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed. The Court of Appeals, Sixth Circuit, have provided petitioner and other members of its bar with a generaal standard for disbarment:
>
> > 'When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred from practice before the court. (Rule 6(3), Court of Appeals for the Sixth Circuit)'
>
> Even when a disbarment standard is unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as malum in se. It also includes conduct for which all responsible attorneys would recognize as improper for a member of the profession." 390 U.S. at 554-555.

In 1978 this Court examined the constitutionality of the prohibition against solicitation by attorneys. In *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 98 S. Ct. 1912 (1978), this Court sustained the prohibition wherein an in-person solicitation was made by an attorney who was doing so for profit. In the case of *In Re Primus*, 436 U.S. 412, 98 S. Ct. 1893 (1978), this Court had before it a violation of DR 2-103(D)(5)(a) and (c) and DR 2-104(A)(5) of the rules of the Supreme Court of South Carolina. An attorney for the ACLU had been found guilty of soliciting a client in violation of such rules where she notified in writing a prospective client of a class action and thereafter represented her in the case. The attorney challenged the constitutionality of such disciplinary rules as abridging her First Amendment freedoms. In passing on the constitutionality of such disciplinary rules, this Court made certain statements appropos to the case at bar:

> " The States enjoy broad power to regulate 'the practice of professions within their boundaries,' and '[t]he interest of the state in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'' *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). For example, we decided today in *Ohralik* v. *Ohio State Bar Association*, _____ U.S. _____, 98 S. Ct. 1912, 55 L.Ed. 2d _____, that the States may vindicate legitimate regulatory interests through proscription, in certain circumstances, of in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to laypersons." 98 S. Ct. at 1899.

This Court further stated:

> "... Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that

potentially are present in solicitation of prospective clients by lawyers, this Court has required that 'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms.' . . ." citing *Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217 (1967). 98 S. Ct. at 1902.

In *Primus*, this Court found that for the ACLU, like the NAACP, litigation is not a technique of resolving private differences, but a form of political expression and political association. This Court then distinguished solicitation for profit from solicitation on behalf of a non-profit corporation and found that the attorney could not be disciplined on the facts of the case. The rules proscribing solicitation for pecuniary gain were sustained.

Again, we saw this Court upholding, not overturning, disciplinary rules and, in doing so, recognizing that the states have 'broad power to regulate the practice of professions within their boundaries.' And, more specifically, this Court refused to deny to the states the power to correct the substantive evils of undue influence, overreaching, misrepresentation, etc. These are exactly the kinds of 'substantive evils' at issue in this case and the Petitioner can cite no authority for his contrary assertions.

It is submitted that the only vagueness in this matter is how Petitioner could believe his conduct to be proper under any definition of any word or standard involved in the proceeding. In essence, the Petitioner is saying he did not understand that adherance to the principles of "common honesty" as well as the *Iowa Code of Professional Responsibility for Lawyers* prohibited his conduct. The Petitioner seeks to have the Court judge his conduct by some non-existent standard. In arguing the denial of due process, he apparently wished to have the Iowa court read the *Code of Professional Responsibility* in some

strict, legalistic and technical manner. This the Court has said it will not do. *Committee* v. *Crary*, 245 N.W.2d 298, 307 (Iowa 1976).

The Supreme Court of Iowa has the inherent power to discipline those lawyers whose conduct is found to be unprofessional. *Theard* v. *United States*, 354 U.S. 278 (1957); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). One precondition that may be constitutionally imposed upon a member of the bar is that he demonstrate "good moral character." *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957); *Schware* v. *Board of Examiners of New Mexico*, 353 U.S. 232 (1957). Iowa has long recognized that lawyers must demonstrate good moral character as a requisite for continuing the practice of law. *State* v. *Rohrig*, 159 Iowa 725, 139 N.W. 908 (1913). It is respectfully submitted that the *Iowa Code of Professional Responsibility for Lawyers* is sufficiently clear by which to judge an attorney's conduct or fitness and that no lawyer should have any difficulty in concluding that Petitioner's conduct was improper and reflects a lack of fitness to practice law.

The point to be made is that while the Disciplinary Rules and Ethical Considerations are sometimes framed in broad terms, it is necessary. The *Code of Professional Responsibility for Lawyers* consists of nine Canons or ethical precepts. In the Ethical Considerations and Disciplinary Rules, the guide is found as to how not to violate the Canons. The Code of Professional Responsibility is read as a whole and applied to a given situation. Not every possible situation can be specifically proscribed, but these are regulatory matters and not criminal statutes. When a reasonable attorney, knowing of these high standards, would know that his conduct was unethical, there is no problem of vagueness. *In Re Primus*, 436 U.S. 412 (1978); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). It is respectfully submitted that such standards are more than adequate to give notice to the attorney of proscribed conduct and as long as he is not denied any procedural due process which

materially prejudices his right to a fair hearing, he cannot be heard to complain that the *Code of Professional Responsibility for Lawyers* is unconstitutional for vagueness.

Petitioner asserts that he was disbarred for conduct that was not a disciplinary offense when the Myers will was drafted in 1973. Petitioner asserts that Ethical Considerations were not then mandatory, but merely aspirational and therefore not a basis for disciplinary action. In urging such proposition he is, in effect, asking the Court to overrule *Matter of Frerichs,* 238 N.W.2d 764 (Iowa 1976) and seems to be saying that the Iowa court recognized in amending EC 5-5 on December 16, 1977, that Ethical Considerations should not form the basis for disciplinary action. (Petitioner also forgets that he was disbarred, not only for violating EC 5-5, but also for violations of DR 5-101(A) and DR 5-104(A)). Petitioner further asserts that the relevant provisions of the *Code of Professional Responsibility* were enlarged by the amendments made in December, 1977, and therefore, he did not have notice that his conduct would result in disciplinary proceedings. He does not deny that he violated the Ethical Considerations as they read before the amendments, but says that they were not mandatory at that time. The fact that some provisions of the *Code of Professional Responsibility* were amended is totally irrelevant to this action. His violations were prohibited before as well as after the *Code* was amended.

The conduct now articulated as proscribed in EC 5-5 is a restatement of old Canon 9, *Canons of the American Bar Association. Cross-indexed to the Code of Responsibility, American Bar Association.* The footnotes from EC 5-5 and EC 5-6 also establish that this conduct has long been proscribed. The case of *In Re Jones,* 254 Or. 617, 462 P.2d 680 (1969) flatly states that this is conduct which an attorney need not be told is blatantly wrong. States which have ruled on the question prior to the time Respondent named himself beneficially unanimously condemned this practice. *In Re Moore,* 218 Or. 403, 345 P.2d 411 (1959); *In Re Kneeland,* 233 Or. 241, 377 P.2d 861 (1963);

Columbus Bar v. *Ramey,* 32 Ohio St.2d 91, 290 N.E.2d 831 (1972); *In Re Krotenburg,* 111 Ariz. 251, 527 P.2d 510 (1974); *Lantz* v. *State Bar of California,* 212 Cal. 213, 298 P. 497 (1931); *In Re McFarlane,* 10 Utah2d 217, 350 P.2d 631 (1960); *In Re Vilkomerson,* 270 App. Div. 166, 58 N.Y.S.2d 922 (1945); *In Re Anderson,* 287 N.E.2d 682 (Ill. 1972). See also the numerous cases cited at 98 *A.L.R.2d* 1234. These authorities establish:

(1) A reasonably informed attorney would be on notice that his conduct in drafting a will in which he is a named beneficiary will subject him to disciplinary action. This rule was well established by cases before Mr. Randall's conduct so his claim of lack of notice is without merit.

(2) The prohibition contained in EC 5-5 is based on the long and unhappy experience of the Bar in attempting to regulate situations fraught with potential for overreaching and abusing clients. EC 5-5 is merely the current articulation of a long-standing prohibition.

The Petitioner has cited the Preamble and Preliminary Statement of the *Iowa Code of Professional Responsibility for Lawyers.* It is readily apparent from the Iowa Supreme Court's decision in *Matter of Frerichs,* 238 N.W.2d 764 (1976) that the language in the preliminary statement is not controlling insofar as it might be read as Petitioner asserts. The Court stated:

> "Respondent seems to suggest the Ethical Considerations are not in all events binding on a lawyer but are merely aspirational . . .
>
> All lawyers practicing before this Court are bound by the Canons and the provisions of the Iowa Code above set out. They are not free to view them merely as aspirational. A Canon cannot be ignored by an attorney on the claim he believes conflicts with his view of a constitutionally protected right. The purpose of the Canons as explained by

the Ethical Considerations, Disciplinary Rules and adjudicated decisions is to show him the professionally acceptable route through questions or doubts he may have regarding such conflicts."

* * *

"The Ethical Considerations of our *Iowa Code of Professional Responsibility for Lawyers* (hereinafter I.C.P.R.L.) describe our common experience and prescribe the objectives for professional conduct. They constitute a body of principles upon which the lawyer can rely for guidance in many situations, including the one before us." 238 N.W.2d 764-766.

Petitioner's assertions that the Ethical Considerations and Disciplinary Rules are so vague and standardless that he was deprived of due process are clearly unfounded. The conduct, a large part of which were his violations of DR 5-101(A) and 5-104(A), for which Petitioner was disbarred was clearly prohibited at the time Petitioner drew Lovell Myers' will and represented Lovell Myers in the lawsuit in question.

CONCLUSION

For all reasons set forth herein, the Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

By Lee Gaudineer
Hedo Zacherle
Lee H. Gaudineer
Karen E. Shaff
Suite 301, 907 Walnut Street
Des Moines, Iowa 50309
Telephone: 515/243-5750
Attorneys for Respondent

APPENDIX

APPENDIX A

On May 19, 1978, The Committee on Professional Ethics and Conduct filed the following against John D. Randall:

COMPLAINT

COUNT I

COMES NOW the above-named Complainant and for its Complaint against the Respondent states:

1. That the Complainant, the Committee on Professional Ethics and Conduct of the Iowa State Bar Association whose chairman is John Gamble of Des Moines, Polk County, Iowa.

2. That the Respondent is an individual licensed to practice law in the various courts of this state and who resides at Cedar Rapids, Linn County, Iowa.

3. That sometime on or about March 14, 1973, the Respondent did consult with, as an attorney at law, Lovell Myers for the purported reason of preparing the Last Will and Testament for Lovell Myers.

4. That at such time the aforementioned Lovell did have substantial property and did have natural objects of his bounty, to wit: Marie Jensen, his daughter, and two grandchildren.

5. That thereafter the Respondent did, as an attorney at law, draft the will of Lovell Myers naming himself as sole beneficiary therein as well as the executor thereof; see Exhibit "A" attached hereto and by this reference incorporated herein.

6. That thereafter in the office of the Respondent and on March 14, 1973, the aforementioned Lovell Myers did publish and execute Exhibit "A" as his Last Will and Testament, the same being witnessed by Noreen K. Utecht, the secretary of the Respondent, and James C. Bennett, at that time a law associate of the Respondent.

7. That after Exhibit "A" was published and executed by Lovell Myers, the Respondent secured Exhibit "A" and placed it in the locked drawer in his desk in his office; Lovell Myers not receiving the original nor a copy thereof.

8. That there had prior to the publication and execution of Exhibit "A" existed an attorney-client relationship between the Respondent and Lovell Myers as well as joint ventures in certain business enterprises, the major one being Myers Farms, Inc. which owned approximately 2,500 acres of Iowa farm land as well as other assets.

9. That the aforementioned Lovell Myers did have, at least, a 50 percent interest in Myers Farms, Inc. with the Respondent owning the balance thereof.

10. That upon the death of the aforementioned Lovell Myers, the Respondent did file for probate, Exhibit "A", in the District Court of the State of Iowa in and for Linn County, the same being docketed as Probate No. P 3070-0276.

11. That upon the filing of the aforementioned Exhibit "A", as the Last Will and Testament of Lovell Myers, the Respondent secured orders admitting the same to probate and appointing himself as the executor of such estate.

12. That thereafter the Respondent did, initially, file a preliminary inheritance tax report or probate inventory stating, in substance, that the estate of Lovell Myers had no assets.

13. That thereafter Marie Jensen, daughter of the decedent, Lovell Myers, filed objections to the probate of Exhibit "A", alleging that the same was published and executed while Lovell Myers was under "undue influence" of the Respondent; subsequent amendments to the petition of Marie Jensen, basically alleged that Exhibit "A" was null and void as the Last Will and Testament of Lovell Myers because the same did give, devise, and bequeath all of his property ot the Respondent while the Respondent and Lovell Myers had a fiduciary relationship and

an attorney-client relationship at the time Exhibit "A" was published and executed.

14. That thereafter Marie Jensen withdrew or dismissed her petition and objections to the probate of Exhibit "A" upon settlement of the matter with the Respondent and the receipt or entitlement to receive from the Respondent a substantial consideration.

15. That the aforementioned actions and conduct of the Respondent constitutes such unprofessional and unethical conduct as to be in violation of DR1-102(A)(1), (3), (4), and (6); EC 1-5, EC 5-5, EC 5-6, and EC 9-6, *Iowa Code of Professional Responsibility for Lawyers* and Section 610.15 and 610.24, subsections (3) and (4), *Code of Iowa.*

16. That the aforementioned acts and violations of the *Iowa Code of Professional Responsibility for Lawyers* and *Code of Iowa,* jointly and severally, constitute such unprofessional and unethical conduct by the Respondent that necessary and appropriate disciplinary action should be taken against him.

WHEREFORE, the Complainant prays that this matter be set for hearing before a Division of the Grievance Commission of the Supreme Court of Iowa, and upon such hearing that the Division make the appropriate findings of fact, conclusions of law, and recommend that the Supreme Court of Iowa take the necessary and appropriate disciplinary action.

COUNT II

COMES NOW the above-named Complainant and for its further Complaint against the Respondent states:

1. That paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of Count I are hereby incorporated by reference.

2. That sometime prior to the Respondent's drafting of Exhibit "A" for Lovell Myers, a dispute arose between Lovell

Myers and the Respondent involving a Gilbert Morningstar and the manner in which Lovell Myers operated Myers Farms, Inc.

3. That the aforementioned dispute between the Respondent and Lovell Myers involved the personal interest as well as the financial interest of the Respondent; these interests were antagonistic to as well as being in conflict with the interest, personal and financial, of Lovell Myers.

4. That with the aforementioned knowledge the Respondent did thereafter draft Exhibit "A" for Lovell Myers and did further thereafter represent Lovell Myers in a lawsuit brought by Gilbert Morningstar as well as continued to represent Myers Farms, Inc. which included the interests of Lovell Myers.

5. That each and all of such acts by the Respondent are further violations of DR's 4-101(B)(2) and (3); EC 5-1, 5-2, and 5-3; and DR's 5-101(A) and 5-104(A), *Iowa Code of Professional Responsibility for Lawyers.*

6. That each and all of the aforementioned acts and cited violations of the *Iowa Code of Professional Responsibility for Lawyers* constitute such unethical and unprofessional conduct that disciplinary action against the Respondent should be taken.

WHEREFORE, Complainant prays as in Count I of its Complaint.

(Exhibit A, Last Will and Testament of Lovell Myers, appears on the following pages)

Last Will and Testament of
LOVELL MYERS

(Filed February 23, 1976)

Opened, publicly read & filed
February 23, 1976
KENNETH L. FERRY, JR.
Clerk of District Court

Carolyn M. Lindsey
Deputy

I, LOVELL MYERS, of the County of Linn, State of Iowa, being of sound mind and disposing memory make, publish and declare this instrument to be my Last Will and Testament and hereby revoke all former wills and codicils made by me.

ITEM I

I direct that the expenses of my last illness and funeral and all debts of every kind, nature and description be first paid by my executor hereinafter named. I have instructed my executor as to my wishes in relation to funeral arrangements and he will attend to carrying out my wishes.

ITEM II

Having been associated with John D. Randall, Sr., for many years and having accumulated property with him, it is my wish that upon my death, he shall have all of my property and I, therefore, give, devise and bequeath all of my property of every kind, nature and description wherever located to my friend, John D. Randall, Sr.

ITEM III

I nominate and appoint John D. Randall, Sr., Cedar Rapids, Iowa, as executor of this Will, and direct that no bond be required of him to secure the faithful performance of his duties as such executor.

IN WITNESS WHEREOF, I have subscribed this Last Will and Testament on this 14th day of March, 1973.

/s/ Lovell Myers

The above and foregoing instrument consisting of two typewritten pages, including the page on which this attestation clause appears, was at the date thereof signed, published and declared by the said Lovell Myers, therein named, to be his Last Will and Testament, in the presence of us and each of us who, at his request, in his presence and in the presence of each other have hereunto signed our names as witnesses on the day and year last above written, and we hereby certify that the above named testator was of sound and disposing mind and memory and more than twenty-two years of age.

WITNESSES

3717 12th Ave. SW
Cedar Rapids, Iowa — /s/ Noreen K. Utecht

1034 75th St. N.E.
Cedar Rapids, Iowa — /s/ James S. Bennett

APPENDIX B

On June 16, 1978, John D. Randall, filed the following:

ANSWER TO COMPLAINT

COMES NOW the Respondent in the above entitled cause and for Answer to the Complaint filed herein shows unto the Court:

COUNT I

1st. He admits paragraph 1.

2nd. He admits paragraph 2.

3rd. He denies paragraph 3.

4th. He denies paragraph 4.

5th. While he admits he drafted the Will of Lovell Myers and that Exhibit "A" is a copy thereof, he denies the balance of paragraph 5.

6th. He admits paragraph 6.

7th. He denies paragraph 7.

8th. That while he admits that an attorney-client relationship existed at one time prior to the drafting of Exhibit "A", he denies that at the time of the drafting of said Will there was any attorney-client relationship existing and further that there was any joint venture as alleged in paragraph 8.

9th. He admits paragraph 9.

10th. He admits paragraph 10.

11th. He admits paragraph 11.

12th. He denies paragraph 12.

13th. He admits paragraph 13.

14th. He admits paragraph 14.

15th. He denies paragraph 15.

16th. He denies paragraph 16.

WHEREFORE, this Respondent prays that Count I of the Complaint be dismissed.

COUNT II

1st. For answer to Count II, the Respondent incorporates the answer to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 the same as if fully rewritten herein.

2nd. That while the said Gilbert Morningstar was a subject of discussion between the Respondent and the said Lovell Myers, he denies there was any dispute involved, as alleged in Paragraph 2.

3rd. He denies paragraph 3.

4th. He denies paragraph 4.

5th. He denies paragraph 5.

6th. He denies paragraph 6.

WHEREFORE, Respondent prays that Count II of the Complaint be dismissed.

COUNT III

By way of a full and complete defense to the matters and things set forth in the Complaint in this cause, this Respondent shows:

1st. That the original Complaint filed herein by Marie Jensen was filed before the Ethics and Conduct Committee more than one year prior to the filing of the Complaint herein, and they

were advised on or about the 9th day of July, 1977, that the matters between the Respondent and the said Marie Jensen had been fully disposed of and settled and the case for the Will contest dismissed with prejudice.

2nd. That both the Professional Ethics and Conduct and the Grievance Committees have failed to promptly and expeditiously dispose of the Complaint aforesaid but have permitted the same to stand without action until on or about the 19th day of May, 1978, all of which had denied this Respondent of a speedy hearing and due process of law.

WHEREFORE, Respondent prays that the Complaint be dismissed.

APPENDIX C

On November 17, 1978, John D. Randall filed the following:

ANSWER TO ANSWER TO COMPLAINT

COMES NOW Respondent and amends his Answer to Complaint by adding the following:

COUNT I

First Defense

That Respondent at no time requested Lovell Myers to name him beneficially in his Will; nor did he suggest the same to Lovell Myers. Because of the long and close association between Lovell Myers and Respondent, exceptional circumstances, pursuant to EC 5-5, existed on March 14, 1973, with respect to Respondent's preparation of the subject Will at the direction of Lovell Myers.

Second Defense

That Respondent at no time requested Lovell Myers to name him executor of his Will; nor did he suggest the same to Lovell Myers. That Respondent was so named executor at the express direction of Lovell Myers.

Third Defense

That, pursuant to the Preamble and Preliminary Statement to the Iowa Code of Professional Responsibility for Lawyers, "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. . ." whereas "* * * Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character." That at the time subject Will was written, no Disciplinary Rule was in effect prohibiting the same, resulting in a total lack of

notice to Respondent that his actions could subject him to a disciplinary action, the same being a deprivation of due process.

Fourth Defense

That Respondent may not be subject to disciplinary action under the Code of Professional Responsibility in relation to circumstances referred to only in an Ethical Consideration and not in a Disciplinary Rule.

Fifth Defense

That the attorney for Complainant engaged in deception and misconduct depriving Respondent of procedural due process by coming to Respondent's office, discussing the complaint with Respondent, requesting information from Respondent, reviewing Respondent's books and files and generally representing himself as an investigator, when in fact, prior to that time, said attorney had drawn and finalized the Complaint against Respondent and had had it sworn to by the Chairman of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. Respondent was not informed in any way of said circumstances, warned of his rights, or advised that said attorney was acting as a prosecutor hunting evidence rather than as an investigator hunting information; and such actions on the part of Complainant warrant dismissal of the Complaint.

Sixth Defense

That the original intent of the language in EC 5-5 was not to prohibit the conduct which is the subject of the Complaint. Said EC 5-5 was derived from Code of Professional Responsibility of the American Bar Association which in turn relied, in part, on the work of Henry S. Drinker, Legal Ethics, 1953 Columbia University Press. In the preface to said ABA Code it is stated:

> "In our studies and meetings, we have relied heavily upon the monumental Legal Ethics (1953) of Henry S. Drinker, who served with great distinction for nine years as

Chairman of the Committee on Professional Ethics (known in his day as the Committee on Professional Ethics and Grievances) of the American Bar Association."

In such volume, Mr. Drinker states at page 94:

"A question is sometimes raised as to the propriety of a lawyer's inserting in the Will a legacy to himself. * * * This, of course, depends on the surrounding circumstances. If they are such that the lawyer might unreasonably be accused of using undue influence, he will be wise to have the provision inserted in a Codicil drawn by another lawyer. Where, however, a testator is entirely competent and the relation has been a long standing one, and where the suggestion originates in the testator, there is no necessity of having another lawyer in the case of a reasonable legacy. * * *

Seventh Defense

That the initial probate inventory filed in the Estate of Lovell Myers listed all the then known assets of the estate and the assigned values were reached after consultation with tax authorities who suggested the assignment of an arbitrary value, stated as such, until an actual value could be determined.

Eighth Defense

That the dismissal with prejudice filed by plaintiff in the Will contest case acts as an adjudication on the merits with respect to the allegations against Respondent and the same is res judicata as to complainant herein.

Ninth Defense

That Complainant's refusal to participate in discovery and in answer to Respondent's interrogatories, advised how it contended Respondent had violated certain statutes and rules, made it impossible for Respondent to become aware of the con-

tentions against him and to properly defend himself, violates Respondent's right to due process, and warrants dismissal of the complaint.

COUNT II

First Defense

Respondent repleads herein defenses one through nine of Count I by this reference.

Second Defense

That prior to March 14, 1973, the only dispute between Respondent and Lovell Myers involving Gilbert Morningstar was whether he should be terminated in his employment with Myers Farms, Inc., the same involving neither Respondent's personal or financial interests, or those of Lovell Myers.

Third Defense

That Respondent did enter his appearance on May 20, 1974, for Lovell Myers and Myers Farms, Inc., in a lawsuit filed on April 29, 1974, by Gilbert and Evelyn Morningstar against Respondent, Lovell Myers and Myers Farms, Inc. Respondent appeared for Lovell Myers in order to prevent his default and encouraged Myers to retain an attorney. Lovell Myers eventually retained attorney Richard Nazette. Respondent withdrew on December 9, 1975. The situation was fully explained to Lovell Myers, and no actions were taken on his behalf without his express consent following full disclosure. Further, no secret or confidence of Lovell Myers was used either to his disadvantage or to Respondent's advantage. That further, the interests of Myers Farms, Inc. in said litigation equally included the interests of Respondent and Lovell Myers.

Supreme Court, U. S.
FILED
APR 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1416

JOHN D. RANDALL,
Petitioner,

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Respondent,

On Petition for a Writ of Certiorari To the Supreme Court of Iowa

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent, in its opposing brief in No. 79-1416, raises arguments based upon several erroneous assertions which convey false impressions and merit response.

Respondent asserts that petitioner raised only one issue in his appeal to the Supreme Court of Iowa: "Should John Randall be Disbarred or Suspended?" It must first be noted that the Supreme Court of Iowa was bound by its rules to consider the entire record on de novo review. By its own holding, the Supreme Court of Iowa is not bound by ordinary error preservation principles in de novo review of attorney disciplinary proceedings. *Committee on Professional Ethics and Conduct of the Iowa State Bar Association* v. *Behnke,* 276 N.W.2d 838, 841 (Iowa 1979). Petitioner's due process arguments are contained in the record on appeal and were therefore before the Supreme Court of Iowa. Petitioner further raised due process objections in his brief before the court below, beginning on the first page, under the heading "Argument." Appellant's Brief and Argument, pp. 1-4. Petitioner again raised due process arguments on oral submission before the court below.

Respondent states that petitioner ". . . failed to properly present any constitutional issues to the Supreme Court of Iowa" and therefore cannot now present them to this Court. Brief in Opp., pp. 10-11. This allegation of jurisdictional defect is amply refuted by the record below, which has been requested for certification and transmission to this Court. The citations to the record below which are set forth in the Petition herein, pp. 10-14, clearly demonstrate the existence of a timely and properly raised federal question sufficient to confer jurisdiction under 28 U.S.C. § 1257(3).

Respondent's statement of the case contains several assertions of fact which are not sustained by the record and which can at best be characterized as disputed.

Contrary to respondent's version, it was petitioner's understanding, prior to December, 1975, that his friend and partner, Lovell Myers, had permission from the Morningstars to sign the warranty deed conveying the "Hess 80" to Myers Farms Inc. Petitioner did not suspect actions by Myers and Morningstar against his interest in the joint venture until after the Morningstar suit against Myers Farms had commenced. Respondent further asserts that Marie Jensen and her family ". . . had maintained a close family relationship over the years . . ." with Lovell Myers. Brief in Opp., p. 4. There is ample evidence in the record to contradict this assertion.

Respondent creates the false impression that petitioner's challenge of the disciplinary panel was based upon the fact that members of that panel asked questions of witnesses. Brief in Opp., p. 7. The record below reveals that petitioner's challenge was predicated upon the identification of new charges not specified in the complaint. Rec. App., p. 260-283.

Respondent's argument, discussing the standards of due process applicable to petitioner, ignores *Ruffalo* and treats the attorney disbarment proceeding as one which is civil in nature. Brief in Opp., p. 8. Respondent's characterization is illustrative of the approach various states have taken in conducting attorney disciplinary proceedings without affording higher due process protections necessary in quasi-criminal disbarment proceedings and mandated by this court in *Ruffalo.*

Respondent asserts that ". . . [p]etitioner did not challenge the conduct of his trial before the Iowa Supreme Court." Brief in Opp., p. 10. This assertion

is incorrect. Contrary to respondent's suggestion that the petition herein comprises an "afterthought" (Brief in Opp., p. 11), petitioner affirmatively seeks redress for the abrupt and callous waiver ruling wherein the Supreme Court of Iowa chose to ignore petitioner's due process argument.

Petitioner argues that disbarment for conduct deemed violative of vague and standardless provisions of the Code of Professional Responsibility contravenes due process under the Fourteenth Amendment. Petition for Cert., pp. 23-4. Respondent states, "His argument in this regard is confined to EC 5-5." Brief in Opp., p. 11. On the contrary, petitioner's argument applies to all of the provisions with which he was charged. A major point herein, is that, in view of the vagueness and potential for abuse posed by the Code provisions, a more definitive standard of due process applicable in attorney disciplinary proceedings is required to guard against the risk of mistaken findings and erroneous decisions.

Finally, respondent suggests petitioner "seeks to have the Court judge his conduct by some non-existent standard." Brief in Opp., p. 16. The opposite is true. The petitioner's argument is that in the absence of due process, he was denied a fair hearing and substantially prejudiced thereby. The Supreme Court of Iowa chose to rubber-stamp the retroactive application of vague and standardless Code provisions to deprive petitioner of his license to practice law. The court below refused to consider petitioner's constitutional

arguments on "de novo" review. In light of the failure of the Supreme Court of Iowa to treat the constitutional issues raised herein, the need for plenary review of the action below is clear; indeed, summary reversal is now in order.

Respectfully submitted,

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